his testimony really or to use his conviction against him. Certainly if he were on trial a juvenile record could obviously not be used against him. However, this shows an incredible bias and prejudice on his part because this was an identification that he made on the basis of 6 photographs. He was on—it must be remembered he was on probation for burglary. A safe, a burglarized safe was found on his property. Now certainly anyone on probation for burglary, when evidence of another burglary is found on their property is going to be highly suspect and be very nervous themselves and when they tell the police officer that they saw someone else near the safe, the police officer shows them 6 photographs, they are going to be under a lot of non-objective pressure to pick someone out to shift the blame and the focus of the inquiry away from themselves. It's
6 just human nature and it's just logic, whereas if he was not on probation for burglary his identification in the picture would be much more credible because he was under no pressure to identify anyone really except the fact that the property was found on his premises. So what happended was, immediately after—this was just the day after the alleged crime, he identified Mr. Davis from his picture and then he went to a lineup, stuck with that identification in mind and under pressure as the court probably can gather from my question, because Mr. Davis, on the strength of this representation and identification on the picture, was arrested. A search warrant was obtained and he subsequently was arrested. So the pressure was great on this witness, and to deny this knowledge from the jury works irrevocable harm to Mr. Davis because it shows that this witness who identified him, who originally identified him, and this is really the only way Mr. Davis is tied in to this particular burglary at all, is through the testimony of this one witness and I think—I'm sure that Mr. Ripley will agree with that. This witness is a key, essential witness. There is absolutely no way Mr. Davis can be tied in with this particular safe but for this one witness. The other tangible witnesses the state has against him are in the car that Mr. Davis was renting. There were some vermiculite safe insulation fibers obtained that could have come from any safe, not necessarily this safe, but any particular safe, so that evidence is certainly—
is obviously not sufficient to sustain—to even give to a
7 jury if they can't even be tied down to that specific safe, so the one key witness that ties Mr. Davis' presence

to this particular safe that was taken from the Polar Bar is the testimony of this one witness Green. Now if the jury is deprived of the knowledge that he was on probation for burglary at that time, the jury is not getting a true picture of the facts because this is of very high—in fact is incalculably high probative value, the fact that he was on probation. It becomes very clear that pressure was brought to bear as one witness—as the juror said that obviously someone who is on probation for burglary when evidence is found, the pressure is great. Now the whole purpose of protecting juveniles' records is to protect it from being used against them. It can't be in the paper, it can't be used in any further criminal proceedings or anything of this nature against them, and this is good because a juvenile is incapable of committing a crime and it has no relevancy whatsoever for impeachment or anything else for presentation, yet in this case this witness has voluntarily chosen to accuse Mr. Davis. This is something he did on his own, something he really did not have to do, but he did do it, and the fact that he was on probation for burglary will shows bias and some motive on his part for making a hasty decision. I'm not arguing, unless it develops on cross examination that I should, that he's deliberately fabricating or that he was implicated in this robbery, but its shows that he wa—or this burglary, but it shows that he was under a lot of pressure to pinpoint someone, a young man confronted by police officers with a safe on his property, the pictures there, the temptation would be great; he's the one that did it.

The COURT. Well, advise me though. You said voluntarily, what do you mean voluntarily? Is it possible, and I'm not prejudging this of course, but is it possible that he may have identified the defendant from memory that he may have seen him? I mean we're reaching a very set conclusion saying he volunteered this information and he may have picked it out from the air. Now is it possible he may be telling the truth?

Mr. WAGSTAFF. Well, certainly, Your Honor, that's possible. But there's no way of—that's the jury question.

The COURT. So this volunteering that——

Mr. WAGSTAFF. Was he telling the truth, can he be believed, can his identification—is it trustworthy? Now in arriving at that conclusion the jury should be allowed to consider all the factors that go into his mind. Why, if it's not a trustworthy decision, why wouldn't it be.

The COURT. Well, what do we mean volun—did he volunteer to pick this picture out?

Mr. WAGSTAFF. Well, what I meant was that he's not accused of a crime himself; he's not taking the stand; he's not—this isn't being used against him as impeachment purposes, it's being used to show—and the actual fact that he was even convicted is not being used against him or adjudicated to be a delinquent as the correct terminology is, is not being used against him but rather it's going to show the fact that he was on probation just the pressure that he was under, and to deny this knowledge to the jury is—it's a balancing of factors, Your Honor, it's a balancing of protecting this man from knowledge of 12 people whom he'll probably never see again that he's on juvenile record for burglary against Mr. Davis, who's presently on trial for 2 quite serious felonies.

The COURT. What's the statute that you mentioned, Mr. Ripley?

Mr. RIPLEY. 28—correction, Your Honor, I meant 47.10.080(g) is the statute.

The COURT. 47.10.080.

Mr. RIPLEY. These are the rules. I'll find rule 23 for the court to read.

The COURT. 47.10.080.

Mr. RIPLEY. .080(g), Your Honor. I have some information if the court wishes further information on this.

[Pause of 40 seconds.]

The COURT. Is there a rule we're referring to?

Mr. RIPLEY. 23, Your Honor——

The COURT. Yes.

Mr. RIPLEY. Juvenile code—or juvenile rules.

Mr. WAGSTAFF. If the court please, when the court's finished I'd like to be heard briefly a little further.

The COURT. Yes. [Pause of 10 seconds.] Very well.

Mr. WAGSTAFF. Thank you, Your Honor. The rule cited by Mr. Ripley states that no adjudication shall be used [indiscernible] in any court proceedings against a juvenile. Now this is really not what I'm attempting to do. I'm attempting to show that he was—I don't care what he's been—entering adjudication or getting that in, that's method, but in an impeachment I think it's under Sidney versus State, a certified judgment of conviction, and I'm not attempting to do that in this case. I'm attempting to show that this witness was on probation for burglary and therefore his identification of Mr. Davis

must be considered in this light because one of the standard jury instructions is, you can consider and should consider the motive, the self-interests of any witness. Certainly this is the highest self-interest, the interest of self-preservation in identifying another person, and I think it's a complete subversion of that juvenile rule to prevent this fact from coming to the jury in a criminal prosecution for a third person, because as I said, the probative value of this is incalculable and it's a balancing of Mr. Davis' trial for 2 felonies versus 12 people learning that this young man was on probation, and the rights of Mr. Davis I think in this case are paramount.

The COURT. Mr. Ripley.

Mr. RIPLEY. Your Honor, you can call it a piano or a snail, but he's introducing that for one purpose only and that is to attempt to impeach Richard Green and that's all there
11 is to it. Now in the first place convictions and convictions only may be shown. I think it's clear from that statute; I believe it's clear from the rule. A determination in juvenile court is not a conviction. The authorities I'm sure are clear on that. Number (2), that's just basic and I am astounded that counsel would argue otherwise to the court. He's talking about impeachment.

The COURT. I think that's basically what we're talking about, is impeaching this witness.

Mr. RIPLEY. Certainly. He says it's not impeachment then he refers to the court's own instruction.

The COURT. That's the only way we can attack this witness is through the process of impeachment.

Mr. RIPLEY. Now——

The COURT. But then, Mr. Ripley, I'm not convinced that perhaps he may not be entitled to do so, because any witness that comes here before this court to testify is subject to impeachment and I mean the paramount interest of the court is to protect the defendant, this defendant, and anyone that would present himself as a witness, he exposes himself to the dangers of impeachment, and I'm wondering in situations—what if we have a juvenile that's a fantastic liar and he's been constantly in problems with the police and the juvenile courts. Can we safeguard that and protect him at the expense of defendants that may have fabricated stories against them?

Mr. RIPLEY. Your Honor is, I'm sure, well aware of
12 the juvenile system. When a juvenile is no longer amenable, and that is a specific finding by the family court,

to treatment as a juvenile then he is bound over, he's waived over, he's treated as an adult. His situation changes then, but not until there has been a specific finding. Now in this—in the factual aspect of this I do not believe that counsel is fully aware of what occurred. Andrew J. Leonard, who was dismissed out of this case, was a prime suspect. I warned the court that I was involved in this case as intake officer for the district attorney's office right on its very inception and I know who was suspect and I know what the police thought, and Andrew J. Leonard was one of them. They were convinced he was up there at the scene. Now I submit to you, Your Honor, that if they were going to suggest, if they were going to put the heat on this kid, we'd have had 2 defendants in on this same eyewitness, but this boy made an honest identification. He stuck by it, he did not——

The COURT. That isn't the issue, Mr. Ripley. That's a determination of fact that I can't make and I will not make.

[Simultaneous speech.]

Mr. RIPLEY [continuing]. Counsel making it.

The COURT. Well, perhaps. I'm looking at the legality of allowing defense counsel to impeach a witness, in this case a juvenile, by showing his problems with the authorities. I looked at the rule and I think the rule is fairly flexible. In the last line it says, in its discretion, when the superior court in its
13 discretion determines that such use is appropriate.

Mr. RIPLEY. But does that not limit it to sentence procedure, Your Honor? That's the way that rule is worded, I believe.

The COURT. It says, "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Mr. RIPLEY. Both of those must be read together. I see that, Your Honor.

The COURT. Yes, and then, "No adjudication under this chapter * * * may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged * * *" and so forth. "The commitment and placement of a child and evidence given in court are not admissible as evidence against the minor in a sub-

sequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state." I think that's very limited too. I think that I'm inclined to allow the impeachment. I may ask defense counsel rather than bring it out as strongly as he may imply, if the person has had police contact and has been under suspicion himself of certain things and may have been cited for certain things I might allow it in that respect without the actual wording that he may have been on probation as such for a conviction because I don't think there is such a thing in juvenile court. I think I might have to allow the jury to consider that towards his impeachment, because we have a defendant here that must be able to answer his witnesses—or those witnesses against him without a disability against him too. You've got to waive it.

Mr. RIPLEY. Your Honor, evidence of prior bad conduct, absolutely you cannot put that on even for impeachment. What can you show for impeachment? A conviction. That .080(g) specifically says it's not a conviction.

The COURT. Against the boy himself, against a juvenile.

Mr. RIPLEY. Your Honor, may I please have it?

The COURT. Yes.

Mr. RIPLEY. "No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction * * *" It's absolutely precluded, Your Honor. You cannot call it a civil adjudication under that specific language.

The COURT. Let's call it what it is; let's call it what it is. The heck with the word conviction, let's use a word that is proper then. But nevertheless, isn't this defendant allowed to show that this so-called witness has had a problem in juvenile court, that he's been under their surveillance and jurisdiction over a period of time and that he has maybe a problem, and I'm not necessarily saying he's lying or not lying, I don't know, but this is going to be a determination for the court—I mean the jury to determine as a factor. This boy has had a contact with juvenile court. I'll not allow the word conviction because it doesn't exist. But let's face it too; if he had been an adult it would have been a conviction, period, and why should this disability that works in favor of the defendant

work to the disadvantage of this defendant—I mean disability against the witness, work to the disadvantage of this defendant?

[Pause of 30 seconds.]

Mr. RIPLEY. All right, I must disagree——

The COURT. Mr. Ripley, I appreciate your—I know that you want to disagree and you're free to do so, but I firmly believe that we allow juveniles to testify and attack that testimony by the attempt by other counsel to show that they may be fancilful or for some other reasons for the sake of the defendant on trail, and I think we owe the defendant here every opportunity to face his accusors and this man is an accusor.

Mr. RIPLEY. Your Honor——

The COURT. Just because he happens to be a minor doesn't minimize that importance.

Mr. RIPLEY. We're talking about impeachment and a conviction, and that's what we're talking about, as the court
16 has said, is available for the limited purposes of casting into doubt the veracity——

The COURT. Right.

Mr. RIPLEY [continuing]. Even under the broadest expression of the rule allowing the use of convictions, it's allowable only as to his credibility, whether he's telling the truth. Mr. Wagstaff was imputed to this condition of civil conviction a whole gamut of reasons [indiscernible—cough] things of this nature that are well outside, it seems to me, what we use a conviction for, if it were a conviction, which it is not.

The COURT. Well, I've indicated that I would allow Mr. Wagstaff to show that this young witness has had contact with the police and is—has had a problem with them and he's under their supervision and perhaps may have incurred whatever pressure Mr. Wagstaff alludes to it, but as I say, let's avoid the word conviction, let's avoid the word probation, but just I think supervision of some kind as it is I think we can allow it, and then he may argue that that might cast some doubt as to his truth, but I don't think it would be conclusive in any way, no more than conclusive that he's telling the truth.

Mr. RIPLEY. Your Honor, may I ask that the court withhold—it's time for the afternoon recess in any event. I would ask that the court withhold its ruling. It'll be my purpose over the evening to produce to the court such authorities as I can find on this subject. I'm morally certain that I'm correct,
17 and if I'm dead wrong I'll back off of it, but I fear that the court is taking a view that is not in consonance cer-

tainly with the philosophy of the juvenile code and I'm certain that I can find substantial authority against it. If not I'll accede to the court's ruling as stated here, and if the court feels it must rule now——

The COURT. We can't go any further anyway. I have a 4:00 o'clock appeal conference anyway, and to go any further would be impossible this evening and I will extend this courtesy requested by Mr. Ripley, withhold my ruling officially until—if you can come forth with any authorities I of course will consider them, but as I say I feel that the court owes a duty to this defendant just like any other defendant that he must confront his accusors without being tied in his defense. Mr. Wagstaff, if you can assist the court with any authorities I'd appreciate it by tomorrow.

Mr. WAGSTAFF. I'll try to, Your Honor. I'm quite busy.

The COURT. Because I'm certain that both counsel wish the court not to make error in one way or another and I have complete faith in both counsel in this respect, and if you can submit any authorities I'll of course consider them. Can you do so by 9:00 tomorrow so I can spend the time I have between 9:00 and 9:30 reviewing the cit——

Mr. WAGSTAFF. Your Honor, I have to be in court at 9:00 tomorrow in the district court for a [indiscernible—interrupted]——

18 The COURT. Can you drop it—well, I mean can you just drop your memorandum if you have a memorandum in my office at 9:00 and then we'll take it up at 9:30.

Mr. WAGSTAFF. Okay, Your Honor.

The COURT. Very well, will you call the jurors in so I may excuse them for the day.

20 PROCEEDINGS

The CLERK. Superior court for the state of Alaska, third district, with the Honorable C. J. Occhipinti presiding is now in session.

The COURT. Resuming the matter of State of Alaska versus Joshua Davis, 70-92 criminal. We'll wait until the defendant shows. [Pause of 10 seconds.] Let the record show the defendant's present with counsel and Mr. Ripley for the state. At the recess yesterday we were hung up on the protective order that the state requested. The court had made a ruling that I was to allow the police contacts of the juvenile witness that

is apparently to appear for the state against the defendant. This morning Mr. Ripley provided me with a memorandum and Mr. Wagstaff with authority from Wigmore on Evidence, specifically testimony impeachment on page 544, section 980, subsection (7) specifically, and I've also consulted with Judge Butcher and discussed the juvenile code and our supreme court rulings on the matter. At this time, Mr. Ripley, do you wish to make further argument?

Mr. RIPLEY. I would stand on my memorandum, Your Honor. It's hastily done but I think it covers the ground and it clearly asserts that convictions only may be shown for purpose of impeachment and it's likewise clear under all the authority that a juvenile adjudication, a finding of dependency, delinquency, any contacts, supervision of the probation authorities arising therefrom definitely does not amount, under any guise, as a conviction. Thank you, Your Honor.

The COURT. Thank you. Mr. Wagstaff——

Mr. WAGSTAFF. Thank you, Your Honor.

The COURT [continuing]. For the defendant.

In the Superior Court for the State of Alaska, Third Judicial District

No. 70-92 Cr.

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS, DEFENDANT

TRANSCRIPT OF TRIAL BY JURY, CONTINUED (EXCERPT)

Before the Honorable C. J. Occhipinti, Superior Court Judge, Anchorage Alaska, October 1, 1970, 10:06 o'clock a.m.

APPEARANCES

For the Plaintiff: J. Justin Ripley, Assistant District Attorney, 1001 Fourth Avenue, Anchorage, Alaska.

For the Defendant: Robert Wagstaff, Attorney at Law, 1208 Gambell Street, Anchorage, Alaska.

Mr. WAGSTAFF. Yes, Your Honor, I agree with Mr. Ripley and I'm familiar with the criminal rule or civil rule that allows impeachment by conviction and I think it's Sidney versus State

that explains the manner in which this is to be done. Certainly if this particular witness, witness Green, were going to testify and he had—were a witness say—let me say this, say he were a witness to the actual burglary, say he were going to testify, yes, I saw Mr. Davis burglarize the Polar Bar; I was there, I happened to be driving by and I observed him, then I agree as far as under the law, what the law is, I don't necessarily agree with the law, but I realize that's what the law is, that I could not bring in the fact that he had been convicted of any other crime or adjudicated to be a delinquent, because really it wouldn't have any relevancy, but for to show his bad character and to try to impeach him in that way, but the fact that he had committed a crime and the fact that he observed Mr. Davis do something really are—the only relationship they would have in that case would be to just discredit this witness to make him appear to be untrustworthy. But this case, the facts are considerably different, Your Honor. This case I'm offering the fact that he had been guilty, whatever you want to call it,
22 adjudicated to be a delinquent is the magic word—magic phrase, because he had committed what would have been in an adult the crime of burglary, actually 2 incidents as I understand of breaking into cabins. Now what I'm offering this for is not to per se discredit the witness, although I suppose this is the ultimate idea, but rather to show bias and prejudice on his part. In other words, this property was somehow tied in—this safe that was found was somehow tied in with him because the police officers, according to the affidavit, which the court has on file of George Weaver on the search warrant question that was argued earlier, the chief investigator in this case talked to Green about this safe, so I'm offering it for this purpose only, not as a judgment and conviction to impeach him, but to show bias and prejudice on his part, that is a lot of pressure would be brought on him personally because the police would obviously know that he in fact has a burglary record, albeit juvenile, this would be a fact known to the police. Certainly any good police officer, anyone else for that matter, would automatically suspect him; that's human nature. Here's a boy who not too long ago has been adjudicated to be a delinquent because he committed 2 acts of burglary. Burglarized property, a safe that was burglarized from the Polar Bar is connected with him. The obvious conclusion, he's the first suspect and the most logical

one at that point and I'm sure the police have made this very evident to him and if they didn't he certainly was aware of it when they told him this was burglarized property. He was aware of pressure on him. Now this is to be distinguished from the fact situation I outlined to the court earlier where the witness had just simply observed Mr. Davis to commit the crime of burglary and to breaking and entering say the Polar Bar because there would be no pressure of his prior convictions, he would not be a suspect necessarily. They would believe him as readily as anyone else. Just the fact tha he was a criminal himself would just affect hi .edibility somewhat but as far as bias and prejudice, the ...t that he would personally have something to gain from this, that would be irrelevant because he would have nothing to gain fro· 's, he just was doing his civic duty and the question of ... prior record would just affect his interpretation of civic duty. But rather this shows bias and prejudice on his part, self-interest, which is certainly one of the key court standard instructions that a juror in evaluating a witness' testimony is allowed to consider his interest in the case. Now certainly I can't conceive of a much more vested interest when someone on the center of a criminal inquiry, investigation, is focused on them, to have an interest to exonerate themselves, and simply what happened in this case, Your Honor, is that as I understand it, this witness was confronted with the safe and said well, I saw 2 Negro suspects by this safe, one with a crowbar, certainly a story that even the most understanding, let alone the most cynical of investigators would tend to question at the very ·st, so the police officer in that case showed him 6 photographs of known felons. The photographs that I've seen, they're all as far as I can tell people I know personally who have criminal records and I think they all are. It was of mug shots for one thing. One of them is Mr. Davis 10 years ago and actually if the court were to see it it's sort of difficult to recognize him. Well, at any rate that's irrelevant and I argued it. They showed him 6 pictures and they said well, here are 6 male Negro known felons in the Anchorage area. Now he knows the inquiry's on him; he knows that if he points out someone else the inquiry is going to shift from him to them and that's exactly what it did. I understand he pointed out Andrew J. Leonard and Joshua Davis. They were subsequently arrested. A search warrant was obtained and they both were arrested on the

strength of his identification of these 6 photographs. A day later, or a couple of days later there was a lineup that we've already argued to the court at which I understand Mr. Green was present and picked Mr. Davis out of. So I'm not offering this information, Your Honor, I don't care whether the judgment and conviction or the equivalent of it, the order adjudicating him to be a delinquent is entered and that's the only way of impeaching a witness. That's not what I'm trying to do. I'm trying to show that he had a special interest in this case because the inquiry was on him; there was a lot of pressure on him personally and this is not just to impeach him because of his record but just to show that he has a special interest,
25 and to deny this—I think the court indicated yesterday it saw the essential unfairness of this and after all the rules of law are flexible and it's a perversion of justice to straitjacket justice because of the narrow interpretation of a particular statute and rule relating to these juvenile procedures. And it's quite clear that the judicial—that the legislative intent, and I think it's obvious what it is, that a juvenile can't commit a crime, by definition. Now this is what the legislature decided would be best to do because of a variety of sociological reasons and they didn't want these records to be used against someone at a later time, in other words someone who's been convicted of a juvenile offense, adjudicated to be a delinquent, this record is closed because they want to give someone, a young man, an opportunity to have a fresh life, a new life, and not be burdened down with these convictions. They also don't want it to be used against him at any other time unless it's in sentencing, which the courts can do. But the intent is not to prejudice other members of society. I think Professor Wigmore's statement is quite apt in this case. It is a perversion of these rules to say that a juvenile who's testifying in a third—in an independent proceeding, that these—the fact that he's been engaged in unlawful activity is totally inadmissible. This is not the purpose, the intent of it. In reading—a careful reading of actually the Alaska statute shows this. It says to be used against
26 the juvenile. Now I suppose in one sense it's being used against him to show his personal interest in this case, but I ask Your Honor, to me this seems—there are a lot of legal subtleties we're talking about. To me this seems like a very obvious question of substantial fair play and justice. I ask Your Honor just to think in your own mind if this was a court trial

and this witness testified that he identified Mr. Davis as standing by this safe with a crowbar or at least was in that vicinity and the court did not know that he himself had been guilty of burglary and that there would consequently be a lot of pressure on him by the investigators and this would make his identification of Joshuaway Davis hurried and untrustworthy to say the least and I think when you think of it in that context and think how much more meaningful, think of the first impression Your Honor had when you realized when I explained it to the court that this young man has a burglary record himself, this is a very important fact in showing his personal interest and bias in the case. It's not just showing his bad character because whether he was telling the truth or not, whether he can be disbelieved, I assume—I have no evidence to the contrary to show otherwise, but rather it shows his personal interest, his anxiousness, there's a lot of pressure on him, police officers around him, and this is what we're talking about, substantial fair play and justice for Mr. Davis. And I think it's a perversion of law to exclude in bringing up of the fact of the existence of these pressures on Mr. Green and it's a denial of justice and
27 I consider it a very substantial and naturally a—I was going to use the term outrageous because the emotion of it grabbed me but that's honestly what I feel. I think it's a denial of justice for Mr. Davis in facing his accusor because in considering even the facts of this case, Mr. Green is really the key witness the state has against Mr. Davis. The only other witnesses, the only other evidence is circumstantial and actually not enough I believe even to get to the jury because what it is as I understand it, and Mr. Ripley, correct me if I'm wrong. Mr. Davis had a rented car which was searched after Green identified Mr. Davis and in it was found safe insulation fibers and some paint chips which can be—which the FBI experts as I understand it. I read their reports pursuant to the court's order, can be said to be from a safe, not necessarily this particular safe because it's very common paint to a Moseler safe which is a common brand and also the fibers, so it's impossible to pinpoint that down to this safe, coupled with the fact it's a rented car that he'd had for 10 days and there's no telling how long it could have been there. It's speculation to connect it. Okay. Well, the whole case revolves then around the fact that this witness Green places Mr. Davis at the scene and his identification is the key thing. He's already made a mistake or with-

drawn Andrew J. Leonard's identification. Now when it's coupled with the fact that this identification was hurried, he was under pressure because he was under suspicion himself and that—as I asked one of the jurors it's common to expect
28 a young man or any adult who points someone out in a picture and the guy's arrested and he stands in a lineup, you know, and he says is this the guy, you said it was him. He knows that he said it was him, we've arrested him for it and that's an awful lot of pressure, Your Honor, on anyone, let alone on a young man and I think it just shows a special interest, not necessarily bad faith, but lack of complete reliability and this is something the jury should be aware of. I think the example that Professor Wigmore uses is very apt, a girl engaged in sexual promiscuity and then she's a witness in a trial against someone for say raping her or something of this nature. To deny the jury this fact is an outrage against justice. It's a denial of facing the accusors. Of course this isn't really the man that's accusing Joshuaway Davis, but this man Green, he's the one that identified him, he put the finger on him on the photograph and that's why Mr. Davis is here today, and to deny Mr. Davis the opportunity to show this special interest, his bias, his leaning to make a quick identification is simply not justice and that's all all of us are here to see, and balancing the injustice to be gained to Mr. Davis against the revelation of this activity on the part of Green, there really is no comparison. There are 12 people on this jury; they'll never see this young man Green again in all probability and it just doesn't—it's not fair, that's all I can say in conclusion and I've tried to amplify this to the court. I feel quite strongly about it; probably more—
29 as strong as Mr. Ripley said he did yesterday. I think it's just a clear question. It's just simply not fair. Thank you

The COURT. Thank you, Mr. Wagstaff. The coust has 2 clear questions then at completely opposite poles. I tend to agree with much of what you said, Mr. Wagstaff. Unfortunately the statutes are not always fair and not always even reasonable. I read Wigmore's testimony impeachment. As far as the contacts that the boy may have had with the police, and I'm probably rationalizing somewhat, any other witness who had police contacts, an adult, couldn't be asked about those contacts, so that the question of impeachment is very, very narrow and our supreme court in Gafford placed those limitations in merely admitting the crime and the time and place of the conviction and the sentence and that's all, period. But of juveniles they've

made an exception, and any exception to a law is unfair, I don't care what it is, whether it's taxes or juvenile code or anything else and it is very, very unfair in many areas. I will have to reverse myself to some degree as to what I said yesterday. I will not allow the contact that the juvenile had, his adjudication to be used as impeachment. Not allowing that I can't allow any other contacts he may have had with the police and this probation he was under and anything else cannot be brought out. You can of course argue the fact that the safe was found on his property, that he may have been frightened for his own
30 implication, I think you can argue that very well if you can, and I don't know enough about the facts to go into that and I am certain that Mr. Ripley will be very judicious in his examination of this young boy and just to highlight perhaps the ridiculousness that you point out, Mr. Wagstaff, we are on record now, public record on what we're trying to protect and I agree, to some degree it's almost ridiculous, but I have to follow the law like I ask everyone else to do and I am I think following it.

Mr. WAGSTAFF. Well, Your Honor, will you permit me to ask anything in this line on——

The COURT. Police contacts, no. As I say, I feel the police contacts of this witness are no different than any police contacts from any other witnesses.

Mr. WAGSTAFF. Well, how about, Your Honor, just bringing out the fact that he was a—a compromise and probably satisfy everyone as much as everyone can ever be satisfied, the fact that he was in a special status, he was under the supervision of some state agency, whatever we want to call it. I mean I think that that will show that he has—it wouldn't bring in the fact that he had a record, had done anything wrong himself, but the fact that he was under some judicial or quasi-judicial or some whatever we want to call it supervision. I think——

The COURT. In effect you're bringing out the record that we're protecting because any supervision would indicate some antisocial behavior which would be a crime for an adult
31 and most people know that. It's statutory and it's public. I think you can probably bring out as strongly as you can that he may have been in fear of being suspected himself without linking any previous contacts. I think this would be fair questioning in cross examination, he maybe feared being suspected, and he probably will answer that in the affirmative

and that might show some bias as you wish to point out. As I say, I'm not siding with the defendant or siding with the state, I'm just trying to tread a very narrow, thin line at this time and it's very difficult for me to do so frankly. I think counsel will appreciate that and I think counsel will see the picture in spite of being on opposite ends of the pole. It's a very, very delicate step that we have here. We're honoring something that our supreme court has said has to be followed; the statute says so and I find it, as I say, in many cases almost ridiculous to follow because we've got it on the record right now. We've got the name of the juvenile, we've got the infractions and everything else, but still we have to protect him.

Mr. WAGSTAFF. Well, Your Honor, I think it's a very sad comment on a criminal trial when the judge as you've—I think you've indicated, feels that this particular rule of law is—that you found existing. I realize you've searched, from your comments on the law, very diligently, but I think it's a sad comment when the judge recognizes this ridiculous rule and perhaps substantial justice is thereby not being done to this
32 defendant and feels obligated to follow the law. I just think it's a sad day, you know.

The COURT. I agree, Mr. Wagstaff. I'm doing this for the record. My comments are for the record because I feel since our supreme court has limited me and the statute limits me and I am here to enforce the law, I have to follow it whether I agree with it or not and whether I like it or not and I'm doing so to the best of my ability although I find moments of rebellion within my own soul. Anything further, Mr. Ripley?

Mr. RIPLEY. No, Your Honor, but since it is a hairline area and since the slightest injudicious [indiscernible—cough] on cross examination can lead to a situation which will become instantly in violation of the court's order, I hope that all parties are clear. It's my understanding that not only will there be no reference to juvenile trials or adjudication, juvenile record, supervision by parole or police authorities, police contacts or police investigation, because anything that opens up anything in that area, support it, goes directly to the adjudication, which is denied.

The COURT. I am granting you this protective order accordingly and Mr. Wagstaff I'm certain will follow it.

Mr. RIPLEY. I'm sure he will.

The COURT. I know he disagrees with me and I, as I say, sympathize, as I stated for the record, but I'm sure that Mr. Wagstaff would be very judicious in his cross examination in that area.

33 Mr. RIPLEY. As long as it's clearly understood.

The COURT. Yes.

Mr. RIPLEY. Thank you, Your Honor.

The COURT. Anything further, Mr. Wagstaff?

Mr. WAGSTAFF. No, Your Honor.

34 CERTIFICATE

SUPERIOR COURT, STATE OF ALASKA, *ss:*

I, Karen W. Kilmer, court transcriber for the third judicial district, State of Alaska, hereby certify:

That the foregoing pages numbered 1 through 33 contain a full, true and correct transcript of proceedings in cause number 70–92 cr., State of Alaska versus Joshua Davis, third district, transcribed by me to the best of my knowledge and ability from third judicial district SoundScriber tapes identified as follows:

Tape No. D–185 Log Nos. 1398.5–1435

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Dated at Anchorage, Alaska, this 26th day of May, 1971.

Signed and Certified to by:
KAREN W. KILMER,
Court Transcriber.

[Inspected by ——— ———, date 5/22/71 Transcript Department.]

35 In the Superior Court for the State of Alaska, Third Judicial District

No. 70-92 CR., No. 70-95 CR.

STATE OF ALASKA, PLAINTIFF

vs.

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUWAY BURL DAVIS, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

September 28, 1970, October 2, 5 and 6, 1970 (Excerpts)

93 Mr. WAGSTAFF. Yes, Your Honor. I have decided that I will make an opening statement at this time.

The COURT. Very well, you may proceed.

Mr. WAGSTAFF. May it please the court, Mr. Ripley, Mr. Ravin, ladies and gentlemen of the jury, at this time I'm going to make the opening statement for the defense. I'm sure

94 you—those of you who have sat on other criminal juries realize that this is unusual. The opening statement is usually reserved, but as you may have indicated—or deducted from the voir dire examination of some length, this is not a standard case. The evidence, as Mr. Ripley has told you that he will produce, in all probability the witnesses will come forward and say what—what he said they did or said they will say. Now the one witness, the one key witness against Mr. Davis is this witness Green. This one if you recall, the one that was at Palmer and he will testify as Mr. Ripley said, about the safe being located there. The evidence that will be brought out on cross examination of these witnesses, of the state's witnesses Green and Investigator Weaver will be that this particular man or boy was himself a suspect of this burglary and he believed himself to be a suspect of this burglary.

Mr. RIPLEY. Object, Your Honor. Did I say that?

Mr. WAGSTAFF. That is what the evidence will show.

Mr. RIPLEY. Oh, excuse me, I thought—go ahead.

Mr. WAGSTAFF. No, I'm sorry, I may have—well, anyway, that's what I am attempting to tell you in opening statement, what I believe the evidence will show. Of course as we've all gone over, what I say is not evidence but I'm attempting to explain to you, as I'm entitled to, what the evidence—what

I expect the evidence will be. The evidence will be that Mr. Green, believing himself to be a suspect of this burglary, identified—made a hasty identification of Mr. Davis—Joshua Davis, from 6 photographs that were presented to him by I believe it was Investigator Weaver, but at any rate one of the Anchorage investigators. This photograph, the evidence will show, was approximately 10 years old and Mr. Green simply made that decision under pressure and said that this is the man I saw standing next to the safe as his story will be, as Mr. Ripley related it to you. The evidence will be that he was then stuck with this story; that as a result of this identification, this snap identification, Mr. Davis was arrested and the wheels of justice were set in motion and that's where we are today. Mr. Davis is sitting here on trial after this identification and subsequent arrest by Mr. Green. The evidence will further show that after making this identification there was a subsequent lineup at which Mr. Green re-identifies Mr. Davis.

Mr. RIPLEY. Excuse me, Your Honor, I really am reluctant to keep interrupting opening argument but these areas that he's opening up are areas which I would submit would be outside the scope of direct unless raised by the state and therefore once again he's putting things before the jury which he has no idea will be developed.

Mr. WAGSTAFF. If necessary, Your Honor, I'll call these as my own witnesses if that's—if it's outside the scope of direct examination.

Mr RIPLEY. Very well.

The COURT. Very well, you may proceed.

Mr. WAGSTAFF. Thank you, Your Honor. The evidence will show that this witness Green then made identification after arrest of Mr. Davis, after Mr. Davis was placed in jail, of—of him in a lineup and that this identification was based upon—solely upon this photograph that he had already identified Mr. Davis from. This is the extent of the way Mr. Davis is tied into this case. The other evidence in the case will be, as Mr. Ripley stated, that in this car that Mr. Davis had been renting for approximately 4 days, there was found some safe insulation fibers—or some insulation fibers that are commonly associated with safes, vermiculite fibers, and some paint chips that could have come from a safe. No evidence at all that this is the same safe, that it's the same fibers, how long the fibers had been there or anything else or—or who else had been renting the car

or anything of this nature, so the evidence will show in this case that the only reason that Mr. Davis is here today is because of this—this snap identification by witness Green of Mr. Davis from a 10 year old photograph while—when he himself believed and was under the pressure that he was suspected of this burglary. That in essence is the case and I ask all of you to listen very carefully to the evidence to find out what the evidence is and to determine whether or not the state has met its burden of proof beyond a reasonable doubt on all issues
97 of the indictment as they're required to do. I would also like to point out that there's absolutely no evidence presented of anyone that saw Mr. Davis burglarize the Polar Bar, no evidence that he was there, no fingerprints, no footprints, nothing. There will be absolutely no evidence connecting him in any way with the Polar Bar and the only evidence as I stated that will connect him even in the vicinity of what was evidently stolen or burglarized from the Polar Bar will be the testimony of this one witness, Green. Obviously his testimony is going to be critical as to—as far as to whether or not you believe him. I request, ask, as I'm sure you will do after hearing what the evidence will be in this case, listen to it carefully. Try and place yourself in his position, how you would feel if you were making this identification and then if you go to the jury room, decide the case on your understanding of the evidence, your understanding of what happened and then place this in the test of beyond a reasonable doubt. Thank you.

The COURT. Thank you, Mr. Wagstaff. Mr. Ripley, you may call your next witness.

* * * * * * *

124 Q. Follow-up investigation, what did you do next?

A. This was on Monday, the 16th of February, 1970, upon arriving to work, it was about 7:30 in the morning as I recall on Tuesday the 17th of February, we had information from a state trooper that the safe had been recovered at mile 25 I believe on the Glenn Highway, or at least had been found there. We had the name of the person who had found the safe and we had information as to what kind of a vehicle had been seen where the safe was found.

Q. This was a report from the state trooper, I take it?

A. Yes, sir.

Q. He had talked to this person——

A. Yes.

Q. [Continuing.] That you're referring to?

125 A. Yes.

Q. Fine. Well, what did you do next? Well, Investigator Gray, let me ask this first. Did you know this person they were talking about?

A. No, I had never met the boy before.

Q. Did you suspect him in any way of having been—having anything to do with this?

A. No.

Q. What did you do next?

* * * * * * *

302 RICHARD LEE GREEN, called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

The CLERK. For the record would you please state your name?

A. Richard Lee Green.

The CLERK. Would you spell your last name?

A. Green.

The CLERK. Would you spell it?

A. Oh, G-r-e-e-n.

The CLERK. And your address?

A. Mile 25, Glenn Highway.

The CLERK. Your occupation?

A. No occupation.

The CLERK. Are you a student?

A. No.

Mr. RIPLEY. Thank you, Your Honor.

303 By Mr. RIPLEY:

Q. Mr. Green, what is your age at the present time?

A. Seventeen.

Q. On the 16th of February, 1970, what was your age?

A. Sixteen.

Q. Very well. You testified that you live at mile 25 on the Glenn, who lives there with you?

A. My stepdad and my mother and my 3 brothers.

Q. Are you presently in school?

A. No, sir.

Q. When did you quit school?

A. I was expelled last year sometime, I don't remember the date.

Q. And for what reason were you expelled?

A. Skipping.

Q. Very well, sir. Since that time what—have you worked?

A. Yes, sir.

Q. What have you worked at principally, sir?

A. Assistant guide in Kodiak and in Palmer for the NYC and now I'm working for the NYC in Chugiak.

Q. What is the MYC that—or NYC that you refer to?

A. It's a youth corps job.

Q. Very well. You say that you now are working at that agency in Chugiak?

A. Yes.

304 Q. How did you happen to take that job, sir?

A. Well, my little brother goes to the school where I'm working.

Q. And how did that fit into your getting the job there?

A. Well, he wouldn't go unless somebody went with him.

Q. I see. What are your duties there with the NYC?

A. Well, I work in the office and sometimes out on the playground and take the kids home on the bus with the busdriver.

Q. Is this a salaried job? Are you paid for this?

A. I am getting paid for it now; I wasn't at first.

Q. Very well, sir. Calling your attention, sir, to the afternoon of February 16th, 1970, did you learn anything about a—a safe that was located on your—yours or your stepfather's property in—in this—at mile 25?

A. Yes, sir.

Q. How did you first come into this knowledge? How did you first find that the safe was there?

A. We met my mother at the little store just above our house there and she told us that they had found one.

Q. How did you know your mother was there?

A. We met her as we were going back to the house.

Q. I see. Who is we?

A. My father and my uncle and I.

Q. Where were you coming from?

305 A. Anchorage.

Q. Very well. Did your—after you met your mother and the situation was explained to you, what was the next thing that you did?

A. I went home with my uncle and my father and he went down and blocked off the road and we waited for the state troopers.

Q. Very well. Was this safe located on or off the Glenn Highway?

A. Off the Glenn Highway.

Q. Mr. Green, if you will please, step to the board and draw a fairly large drawing including the Glenn Highway and this cutoff, the road up to your place, and try to make it large enough so that we can later draw vehicles on it and the jury can see it. Indicate please which direction Anchorage is on the Glenn Highway as well. [Pause to 084.]

A. This is Anchorage here [indicating]——

Mr. RIPLEY. Can—excuse me, can the jury see the drawing and can the jury hear him? Thank you.

Q. Please speak up as loud—loud enough so everybody can hear you.

A. Okay, this is Anchorage and Palmer, and this is where I was living at the time and this is where I'm living now. We had a trail that went down to here and this is where
306 my pickup was sitting in the road. This is where I'd seen the vehicle right here [indicating].

Q. Very well, sir. Can you give us an approximate distance from your—from one house to the other?

A. Be 400 yards, or something like that.

Q. Now you state at—at this time your—your family was living at which house?

A. This house [indicating].

Q. What were you doing with respect to the lower house?

A. I was going down to get some coffee for my fa——

Q. Well, what was your family doing with respect to the lower house?

A. We was building on this house.

Q. I see. Was anybody actually staying there at this time?

A. No.

Q. Very well. And you testified that—and you've made one diagonal mark on there and said that's a pickup. Would you point that clearly to the jury again.

A. This is the pickup here [indicating].

Q. And how was that pickup parked and whose pickup was it?

A. It was my truck and it was off the side of the road blocking almost half of it.

Q. Very well. And you've drawn on there another car. Would you indicate with an arrow large enough for the jury to see, which direction the front of that car was pointing?

307 Very well. Perhaps for the sake of clarity, would you put the arrow below that car then perhaps with your finger then you can erase the—erase the other arrow that you drew. Thank you. Do you recall—when you were going from your upper house to your lower house, what was your errand at that time? What were you going to the lower house for?

A. To get some coffee.

Q. Who had sent you on this errand?

A. My mom.

Q. What time of day was this?

A. Around noon sometime.

Q. Very well. And you've indicated that you went cross-country; is there a path there or——

A. Yeah.

Q. And would you indicate for the jury just with your hand where that path comes out onto the road again?

A. 'Bout—about here in front of the truck (indicating).

Q. All right. You've also indicated—strike that. Now would you indicate more slowly the route that you took and where you came onto the road with respect to your pickup truck.

A. Well, I came down—we have a [indiscernible] and I came down here in front of the truck and then I went around like that [indicating] you know, in between the car and the

308 truck.

Q. Very well. Did you observe any persons there at that time?

A. Yes, sir.

Q. Very well. Will you make 2 marks on there indicating where these persons were standing?

A. One was here and behind the car, the other one over here alongside of the car [indicating].

Q. Very well. You've indicated that you later in the day went to the site where this safe had been found. Would you please put an S where the safe was found? [Pause.] At the time of your—your first passing through this area, did you observe a safe?

A. No, sir.

Q. Very well. For now would you please resume the witness stand? [Pause.] How long had your pickup truck been parked at that angle, do you recall?

A. About a month, maybe longer.

Q. Do you know the reason why it was parked there?

A. Yeah, it was out of gas.

Q. Will you describe the sedan or other car that you saw there when you went down through?

A. Well, it was a late model Chevy, metallic blue.

Q. Had you ever seen that car before?

A. No, sir.

Q. Have you to your knowledge seen it since?

A. No.

309 Q. Very well. And you testified that 2 persons were standing in the vicinity of the car. With respect to the person that was standing at the back end of the car, did you have occasion to speak to him or him to you?

A. Yes, sir.

Q. You did. Do you recall who spoke first?

A. Yeah, the man behind the car.

Q. What, if anything, did he say to you?

A. He asked me if I lived around there and if my daddy was home.

Q. And how did you answer these questions?

A. I said, yeah, and my dad wasn't there.

Q. He wasn't there?

A. Yeah.

Q. Very well. Did you ask them any questions?

A. I asked them if they needed some help.

Q. Why did you ask that question?

A. Well, I thought they were stuck there, you know, something like that.

Q. What did they say?

A. No.

Q. At that time then what did you do?

A. I went on up to the other house.

Q. By the other house do you mean the upper or lower?

310 A. The house closest to the highway.

Q. Very well. Down closest to the letter P?

A. Yeah.

Q. What did you do when you got there?

A. I got the can of coffee.

Q. What did you do then?

A. Went on back up to the other house.

Q. Do you recall whether you were walking or running at this time?

A. I was running.

Q. How do you know that or recall that?

A. Well, I always run, it's faster.

Q. I see. Was your return route pretty much the same or was it different from the route you took coming down?

A. About the same.

Q. When you returned to the vicinity of the pickup truck and the sedan and the safe do you recall the position of the 2 men at that time?

A. Yes, sir.

Q. And what was the position of the 2 men at that time?

A. About the same.

Q. Very well. With respect to the—well, did you speak to either of them on that trip?

A. I don't think so.

Q. Very well. Do you recall—were—were you walking or running when you went through that area?

311 A. Probably a fast walk.

Q. That's on the trip back?

A. Yeah.

Q. On the trip down were you walking or running when you went through that area?

A. I walked.

Q. Very well, sir. This man that was standing beside the—or at the back end of the car, do you recall whether he had anything in his hand?

A. Yes, sir.

Q. And do you recall what that was?

A. Yeah, it was a—something like a crowbar.

Q. Very well, approximately how long, can you estimate it?

A. Maybe a foot and a half, 2 foot.

Q. Which of the 2 men did you have your conservation with?

A. The shorter of the 2.

Q. Do you recall what he was wearing?

A. Dark coat and dark pants.

Q. That person that you saw and with whom you had that conversation, is he here in the court today?

A. Yes, sir.

Q. Would you indicate for the record who he is?

A. The man in the middle over there [indicating].

Q. By the middle over there you mean this gentlemen
312 between Mr. Ravin and Mr. Wagstaff, the 2 men——
A. Yes, sir.

Q. [Continuing.] With beards? At the time you first saw these 2 men and you say you did not see the safe?

A. No, sir.

Q. Do you—did you attach any particular significance to their being there?

A. No.

Q. Approximately how far—well, when the safe was discovered you said that you went back down there with other members of your family, approximately how far from the position where that sedan had been parked was this safe located?

A. Oh, about—just to the side about a foot behind them in the ditch.

Q. Approximately how far would you estimate from where the—estimate from where the car was parked?

A. Possibly 3 feet.

Q. Now you did not see the safe when the car was parked there?

A. No, sir.

Q. How can you estimate now the position of that safe with respect to where the car was formerly parked, is there any way you can do that?

A. Well, it was—the car was close to the pickup and it left kind of melted spots where the tire was and the exhaust.
313 Q. I see. How many of these melted spots from the tires were there, do you recall?

A. Four.

Q. Do you recall seeing one from each tire?

A. Yeah, you know, a set.

Q. And the spot from the exhaust, do you recall how big around that was?

A. Umm, maybe a foot across, more.

Q. And it's based upon those markings in the snow that you est—that you estimate the distance between the safe—safe and the car, is that correct?

A. Yeah, that and where I remember seeing it.

Q. This man that you've identified here in court today, the defendant, that you say you recall seeing him at the car?

A. Yes, sir.

Q. Is your recollection today based strictly on that?

A. Yes, sir.

Q. Did you have occasion after this time to identify this man from a series of pictures?

A. Yes, sir.

Q. Did you have any trouble doing so?

A. No, sir.

Q. Did anybody suggest to you which of these pictures was the man that was suspect?

A. No, sir.

Q. And was your identification of the man in the picture based upon your recollection of his presence on the road
314 that day?

A. Yes, sir.

Mr. RIPLEY. I have no further questions of this witness, Your Honor.

The COURT. Thank you, Mr. Ripley. You may cross examine, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

RICHARD LEE GREEN, testified as follows on:

CROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, as I understand it, you went down to the police station, the Anchorage city police station by yourself, or at least as far as your family is concerned, but in the company of 2 police officers, Investigator Gray and Investigator Weaver?

A. Yes, sir.

Q. Were you upset at all by the fact that this safe was found on your property?

A. No, sir.

Q. Did you feel that they might in some way suspect you of this?

A. No.

Q. Did you feel uncomfortable about this though?
315 A. No, not really.

Q. The fact that a safe was found on your property?

A. No.

Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

A. I thought they might ask a few questions is all.

Q. Did that thought ever enter your mind that you—that

the police might think that you were somehow connected with this?

Mr. RIPLEY. I'm going to object to this, Your Honor, asked and answered. It's a minor paraphrase of questions that have been asked and answered.

The COURT. It's paraphrased again. I'll allow it, just hopefully we don't get too deep in repeating it, but I think you are repeating the question. He may answer it if he can.

A. No, it didn't really bother me, no.

Q. Well, but——

A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, not that you——

A. That came across my mind, yes, sir.

316 Q. That did not cross your mind?

A. Yes.

Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

A. Yes, sir.

Q. And then went into the investigators' room with Investigator Gray and Investigator Weaver?

A. Yeah.

Q. And they started asking you questions about—about the incident, is that correct?

A. Yeah.

Q. Had you ever been questioned like that before by any law enforcement officers?

A. No.

Mr. RIPLEY. I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind——

The COURT. I'll sustain the objection.

Mr. RIPLEY. The suspect, he's——

Q. How long were you there, Mr. Green?

A. At the police station?

Q. Yes.

A. Oh, I don't know, not too long, maybe a half an
317 hour at the longest.

Q. How long had you been there before they produced these pictures?

A. Five minutes or so, I don't know, it wasn't very long.

Q. They—they produced 6 pictures and you identified one from—from that batch, did you not?

A. Yes, sir.

Q. Did this picture look exactly like the person that you had seen?

A. No, not exactly.

Q. What was the difference?

A. Well, the man didn't have a mustache on, I don't believe.

Q. What did you do after you left the police station, go back to Palmer?

A. Back to my house, yes.

Q. Did they drive you back?

A. Yeah.

Q. Then you came down the following day, did you not, back to the police station?

A. Yes, sir.

Mr. RIPLEY. I'm going to object to this, Your Honor, as outside the scope of direct——

The COURT. I assume——

Mr. RIPLEY [continuing]. As well as getting into an area in which I believe defense counsel's raised an objection
318 and been sustained.

The COURT. Mr. Wagstaff.

Mr. WAGSTAFF. Yes, Your Honor, what I'm attempting to show here is getting into, of course, the lineup, the fact that there was identification later and that his identification today is based upon—somewhat based upon his identification at the lineup.

Mr. RIPLEY. Your Honor, when I se—when I attempted to do it, I hate—you know, I didn't even want to use that magic phrase but when we got into this area with other persons, objection was raised and that's why I stayed away from it with this witness.

The COURT. I'll overrule the objection. Counsel has opened this and now he can examine it and I'm sure that you can——

Mr. RIPLEY. May we be heard very briefly before the bench, Your Honor?

The COURT. Yes.

[Whereupon there was a brief whispered conversation at the bench and the following proceedings were had:]

The COURT. You may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, you then went down and participated in what's called a lineup, did you not?

319 A. Yes, sir.

Q. And roughly probably you went down and talked to one of the police investigators first before you went in to the lineup?

A. Yes, sir.

Q. And they had several persons, do you recall how many, in a room that you——

A. No, sir.

Q. Less than 10 or more than 10 would you say?

A. I don't know. I think it was around 10, I——

Q. And you walked through the room with one of the investigators?

A. No, sir.

Q. What—how did you happen to observe these persons that you described?

A. Well, they were up against the wall. I just walked through the doorway.

Q. Into the same room where they were or——

A. Yes, sir.

Q. I see. You identified 2 persons, did you not?

A. Yes, sir.

Q. And one of these persons later turned out to—well, let me say this, didn't one oft he police officers after you identified these 2 people say that it was impossible for one of them to have been the person that was there?

320 A. Yes, sir.

Q. Now is Joshuway Davis, the defendant, the person that you saw at this lineup?

A. Yes, sir.

Q. Now when you think back on this incident, this—both the lineup and the photographic identification and this incident out at mile 25 occurred at approximately the same time, did they not?

A. Yes, sir.

Q. So when you think back on it are they sort of meshed together in your memory as happening all about the same time?

Mr. RIPLEY. I'm going to object to that, Your Honor, as quite—well, with that clarification I guess my objection is not so well taken. I thought it was quite a vague question. Perhaps it could be rephrased.

The COURT. You may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Yes.

Q. Meshed toge—what I—what I meant, Mr. Green, meshed together in your memory as all having happened roughly the same time?

A. Yes, sir.

Q. Now when you identified Mr. Davis today in court, can you really separate in your own mind the fact that he was also the person that you identified in the lineup?

321 A. Yes, sir.

Q. You—are you sure you can?

A. Yes, sir.

Q. There's no—there's no—well, let me—let me say this; let me start over. He is the person you identified in the lineup, is that correct?

A. Yes, sir.

Q. And when you think back on—on this incident, do you feel that when you—when you think of Mr. Davis and think of him and seeing him today, you think of him probably, I assume, as the person you saw at the lineup and the person you saw—you identified——

Mr. RIPLEY. I'm going to object to that, Your Honor, as a—an assumption of counsel not based upon the facts before us. He's testified at least twice that I can recall that he has these matters separated in his mind, that his identification goes from that confrontation back on the road and now counsel said, I assume from your testimony that it's based upon the lineup. Now that is an assumption not based upon facts of record Your Honor.

Mr. WAGSTAFF. Your Honor, I hadn't finished my question and perhaps . . . .

Mr. RIPLEY. Well, I object to the question in its narrative rambling form then and for its assumptions.

The COURT. Mr. Wagstaff, you may continue.

322 Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, let's see if I can remember where I was—Mr. Green, you recall I talked to you last Friday in the hall, do you not?

A. Yes, sir.

Q. And we discussed this very question, did we not, concerning the distinction between lineup identification and whether there was one between the—your memory back and what happened at Palmer or the Glenn Highway?

A. Yes, sir.

Q. And you recall, do you not, that you told me that as far as making a complete separation in your mind that due to the fact that you had not seen Mr. Davis since these 3 incidents, these 3 times you say you saw him in February, that you could not really say for sure whether or not his identification in court would be strictly as the person you saw at the lineup, strictly as the person you saw in the photograph or strictly as the person you saw on the—at mile 25 on the Glenn Highway but it was rather all of these, didn't you tell me that?

A. No, sir, I didn't.

Q. Well, what did you tell me?

A. I said; sir, I couldn't make a positive identification until I saw the witness.

Q. Till you saw him in court?

323 A. Yes, sir.

Q. As far as your own mind sitting out there before we went into court today, or this was on Friday that I'm referring to, it was all meshed together in your memory at that time, the 3 incidents.

A. No, not really.

Q. Well, what did you mean, what did you tell me? Am I misstating what you told me?

A. Well, I—I can't remember exactly what I said to you, but I said I remembered him from—from the car when I see him in the pictures and from the car when I see him in the lineup and I—you know, there's a difference there.

Q. Didn't you tell me that as far as separating the 3 that it was very difficult for you do this in your own memory?

A. Right now it would be, yes.

Q. Right now it would be, that's what I'm talking about.

A. Well, I can't remember what the pictures looked like.

Q. You can't remember what the picture looked like?

A. No, I can't right now.

Q. So as far as today—now we're talking about today, Mr. Green. I realize these questions we're talking about 3 different—or actually 4 different incidents over a long time span, but

as far as today, when you think back on Mr. Davis who's sitted—seated right here [indicating] can you really dis-
324 tinguish between these—the 3 identifications you say you made of him back in February?

A. I can't remember him from the picture right now or from the lineup, but I remember him from the car.

Q. From the car you say?

A. Yes, sir.

Q. This is not what you told me last Friday.

A. I says I——

Q. Is it?

A. I said I couldn't make a positive idenica—identification until I did see the witness. I've seen him and I can make it now.

Q. What about at the lineup, you don't remember what he looked at—looked like up at the lineup?

A. Yes, I did then and I—I don't——

Q. You don't now though?

A. I'm not saying that.

Q. Well, you just said that you don't remember what he looks line in the lineup and the picture yet you remember another incident that happened prior to those 2. Doesn't that seem a little strange to you?

A. No.

Q. You're saying though today, I'm not misunderstanding you, that you don't remember what he looked like at the lineup and you don't remember this picture you saw of him?

325 A. Not very clearly, no.

Q. But yet you do remember identifying him in that picture that we're referring to and in the lineup?

A. Yes, sir.

Q. Were you in any hurry in the lineup?

A. No.

Q. And you were specifically looking for someone in the lineup, weren't you?

A. Yeah.

Q. And trying to see if you could remember this someone at the lineup, were you not?

A. Yeah.

Q. And when you saw these 2 Negro males on—at mile 25 Palmer highway, you were not specifically trying to remember what they looked like at that time, were you?

A. No, sir.

Q. You were not trying to picture their description in your own mind, what they had on, what they looked like or height or anything else, were you?

A. No.

Q. 'Cause you didn't really suspect anything was—strange was going on did you at that time?

A. No, sir.

Q. Which of the persons did you talk to at the car?

A. The man behind the car.

326 Q. Now was he the taller or the shorter of the 2?

A. The shorter of the 2.

Q. By behind the car what do you mean, behind the car with reference to where you were standing or what?

A. Well, in the rear end of the car, towards the trunk.

Q. At the—behind the rear of the car. Where were you standing?

A. Well, I was walking by at the time. I'd say behind the car too.

Q. Where was this other man standing?

A. On the other side of the car.

Q. From you?

A. Yes.

Q. There was—the car was between the 2 of you?

A. Yes, sir.

Q. And where were—you were standing in the back of where? I'm sorry, with reference to the side of the car?

A. Well, practically in front of the man behind the car.

Q. Practically in front?

A. Well, to his side and then to his front as I went on by.

Q. How far away from him were you?

A. Possibly 3 feet.

Mr. WAGSTAFF. May I have one moment, Your Honor.

The COURT. Yes.

327 Mr. WAGSTAFF. No further questions, Your Honor.

The COURT. Very well. Any redirect, Mr. Ripley?

Mr. RIPLEY. Yes, Your Honor.

RICHARD LEE GREEN testified as follows on:

REDIRECT EXAMINATION

Q. At the lineup, sir, will you just tell the jury in your own words—let me ask you specific questions. Who brought you to the station for the purpose of viewing this lineup?

A. Detectives Weaver and Gray.

Q. Where did they have you wait during the time that they were preparing the lineup?

A. Oh, there's a little office, I don't know, across the hall and down a ways I guess.

Q. Very well. You testified that there were a number of people in this lineup?

A. Yes, sir.

Q. What race were these people?

A. Colored people.

Q. Had you seen any of the persons in that lineup coming and going in front of any door or window in the office where you were kept?

A. No, sir.

Q. Did Investigator Gray, Investigator Weaver or
328 any other person suggest to you who you would or should pick out of this lineup?

A. No, sir.

Q. Did Weaver or Gray or any other person accompany you into the room where the lineup—or the viewing was conducted?

A. I think Detective Gray did.

Q. Do you recall his instructions to you prior to going into the lineup?

A. Yes, sir.

Q. And what were his instructions to you?

A. Well, all the men had numbers on them and I was to pick out the 2, you know, that I remembered and then go back into another room and tell him the numbers.

Q. Very well. And by numbers can you describe particularly what type of numbers, sir?

A. Well, they had little square cards, you know, with 1, 2, 3, 4 and like that.

Q. In other words a single digit number, one of them number one, one of them had 2 and the like?

A. Yeah.

Q. Not a great row of numbers?

A. No.

Q. Do you know whether any other person looked at this same lineup of people with a—you know, to make an identification such as you did?

329 A. Yes, sir, I think there was a——

Q. Well, that's—yes or no?

A. Yeah.

Q. Did you talk to that person either prior to or—before going in and making your identification or after you came out?

A. No, sir.

Q. The answer was no?

A. Yes.

Mr. RIPLEY. If I may have a moment, Your Honor.

[Whereupon there was a brief whispered conversation and the following proceedings were had:]

The CLERK. Plaintiff's 35 marked for identification.

[Plaintiff's exhibit 35 identified.]

Q. I hand you, sir, what has been marked plaintiff's 35 for identification and ask if you can tell us what that is.

A. That's the lineup where I was sent—or you know, where I went.

Q. Very well. And do you recognize the participants there?

A. Yes, sir.

Q. Do you recognize the defendant——

A. Yes, sir.

Q. [Continuing.] In that picture? Does he look different in that picture than he did on the road that day?

330 A. Yes, sir, I don't think he was wearing glasses at the time.

Q. You stated earlier that there may have been as many as 10, you were uncertain as to the number of persons in the lineup?

A. Yes, sir.

Q. And how many persons are there in that lineup?

A. Seven.

Q. And they're all bearing the little numbers you testified to?

A. Yes, sir.

Q. Are the numbers in order?

A. No, sir.

Q. Did anybody give you any clues as to what number——

A. No, sir.

Q. [Continuing.] You were looking for? Do you recall how much—how many days there were between these occurrences? For example, how many days after you found the safe was it when you identified the defendant's picture?

A. I think there was about 2 days.

Q. And how many—how many days, if you recall, were there

between identifying the picture and picking them out of the lineup?

A. I think there was just one day.

Q. Mr. Green, when you identified the defendant at
331 the lineup were you certain in your own mind that you were right?

A. Yes, sir.

Q. Did you pick out somebody else at that lineup?

A. Yes, sir.

Q. Were you certain of him?

A. No, sir.

Q. And you told one of the detectives that, didn't you?

A. Yes, sir.

Mr. WAGSTAFF. Objection, Your Honor, that's——

Mr. RIPLEY. Leading. I—I would—I'd withdraw the question.

The COURT. Yes, it's leading. I'll sustain the objection.

Q. Did you make a statement to one of the detectives as to your certainty as to the other person?

A. Yes, sir.

Q. Do you recall what you told him?

A. Yes, sir.

Q. Please tell us.

A. I told him that I wasn't sure about—I forgot what number it was, but I told him I wasn't sure of that number.

Q. But the number of the defendant you were sure, is that correct?

A. Yes, sir.

Mr. RIPLEY. No further questions.

The COURT. Any recross?

332 Mr. WAGSTAFF. Your Honor, may I approach the bench with counsel briefly?

The COURT. Yes.

[Whereupon there was a brief whispered conversation at the bench and the following proceedings were had:]

Mr. WAGSTAFF. May I approach the witness, Your Honor?

The COURT. Yes.

RICHARD LEE GREEN, testified as follows on:

RECROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, do you recognize this statement?

A. Yes, sir.

Q. That's the statement you gave and signed?

A. Yes, sir.

Q. And this was the 17th day of February, 1970, I believe it's dated?

A. Yes, sir.

Q. And that statement is true and correct, is it not?

A. Yes, sir.

Mr. RIPLEY. Excuse me, in this regard, I know it's probably not customary for me to interrupt on voir dire, I have reason to believe—well, perhaps I should approach the bench if I may.

333 [Whereupon there was a brief whispered conservation and the following proceedings were had:]

The COURT. Very well, you may continue, Mr. Wagstaff.

Mr. WAGSTAFF. Thank you, Your Honor.

Q. Mr. Green, could you read the second sentence there commencing with I observed?

A. I observed a late model metallic blue Chevrolet stopped at the end of this side road. It had its engine running and I observed 2 colored male—males standing by the rear of the vehicle.

Q. That's the statement you gave on February the 17th?

A. Yes, sir.

Q. Thank you.

Mr. WAGSTAFF. I have no further questions, Your Honor.

The COURT. Anything further?

RICHARD LEE GREEN, testified as follows on:

REDIRECT EXAMINATION

By Mr. RIPLEY:

Q. With respect to that last question, did you—well, let me ask you this, how was the statement taken? Did you dictate it into a microphone or did you tell the police and have them write it down or how did that go?

A. I believe I was talking to 2 policemen.

Q. Are some of the words used in there your words?

334 A. No, sir.

Q. Well, are—are some of them your words?

A. Oh, yes, I mean, you know——

Q. Are all of them your words?

A. No, sir.

Mr. RIPLEY. Nothing further, Your Honor.
The COURT. Anything further, Mr. WAGSTAFF?
RICHARD LEE GREEN, testified as follows on:

RECROSS EXAMINATION

By Mr. WAGSTAFF:

Q. Mr. Green, did you read that statement over before you signed it?
A. I don't remember. I believe I did.
Mr. WAGSTAFF. No further questions, Your Honor.
The COURT. Anything further from this witness?
Mr. RIPLEY. No, Your Honor.
The COURT. Very well, Mr. Green, you may step down and thank you.
A. Yes, sir.

* * * * * * *

The Supreme Court of the State of Alaska

[File Nos. 1428 and 1436]

JOSHAWAY DAVIS, A/K/A JOSHUA BURL DAVIS, A/K/A JOSHUAWAY BURL DAVIS, APPELLANT

v.

STATE OF ALASKA, APPELLEE

OPINION

[No. 816—July 28, 1972]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, C. J. Occhipinti, Judge.

Appearances: Robert W. Wagstaff, Anchorage, for Appellant. John E. Havelock, Attorney General, Juneau, Seaborn J. Buckalew, Jr., District Attorney, and Charles M. Merriner, Assistant District Attorney, Anchorage, for Appellee.

Before: Boney, Chief Justice, Connor and Erwin, Justices [Rabinowitz, Justice, dissenting in part, concurring in part, and Boochever, Justice, not participating].

BONEY, Chief Justice: On February 16, 1970, the Polar Bar in Anchorage was burglarized, and a small safe weighing approximately 200 pounds was taken from the back room.

Early the following morning the Anchorage Police Depart-

ment received word from the Alaska State Troopers that a safe had been discovered along a little-used side road off the Glenn Highway, about 26 miles from Anchorage. Local residents had found the safe lying on its side in brush approximately 100 feet off the main road. The dial and handle were broken and the bottom of the safe had been pried open.

The State Troopers indicated that the discovery had been reported by Jess Straight, whose home was near the site of the discovery. At trial, Straight's stepson, a juvenile on probation for burglary, testified that he, his stepfather, and his uncle first viewed the safe at about 5:00 p.m. on February 16. The juvenile told the officers that at about noon the same day he had seen two black men standing alongside a late model metallic blue Chevrolet sedan at the same location. He approached the shorter of the two men and asked if they needed any help. He identified this man as blacks, mustachioed, wearing a black-brown mackinaw, and carrying a crowbar. Approximately 15 minutes later, the youth again observed the two men and the automobile at the site.

After receiving this report, Anchorage Police Investigator George E. Weaver canvassed the automobile rental companies in the area. He learned that Airway Rent-A-Car had rented a 1969 metallic blue Chevrolet Impala to Joshuaway Davis on Feburary 11, and that Davis had returned shortly after noon on February 16 to extend his rental contract. The Rent-A-Car agent said that Davis had paid an additional $50 from a large roll of bills and two rolls of quarters.

Investigator Weaver then asked the juvenile witness if he would come down to the police station in Anchorage to look at some pictures. The youth studied five pictures of black men for approximately 30 seconds, during which time Investigator Weaver went about other business and did not say anything or show any interest in the inspection. The juvenile then identified Joshuaway Davis as the man to whom he had spoken and Andrew J. Leonard as the other man he had seen near his home. Later the Rent-A-Car agent also selected the picture of Davis from among the five photographs.

On Feburary 18, Investigator Weaver presented an affidavit before a district judge requesting the issuance of a warrant for the search of both the residence of Joshuaway Davis and the rented car in his possession. The affidavit recited that the affiant was competent to testify; that the bar had been burglarized

and the safe stolen; that the named juvenile had observed the two black men near his home at approximately noon the same day; that he had spoken to the shorter man and had observed that this man was wearing a brown and black mackinaw type jacket and carrying a crowbar; that the youth had returned to the area at approximately 5:00 p.m. and had observed the safe; that dust, fibers and markings had convinced the affiant that the safe was the one burglarized from the Polar Bar; that further investigation had disclosed that a 1969 metallic blue Chevrolet had been rented to Joshuaway Davis on February 11; that both the Airways Rent-A-Car agent and the youthful witness at the scene had selected the picture of Joshuaway Davis from among the five mustachioed blacks; and that shortly after noon on February 16, the person identified as Joshuaway Davis had extended his rental agreement and had paid an additional $50 from a large roll of bills and two rolls of quarters. The affiant then stated his belief that the premises and the automobile contained specified items of evidence as well as "other evidence" of the crime. Without further hearings or considerations beyond the affidavit, the district judge issued search warrants for the premises and the automobile.

I

Davis first argues that the affidavit of Investigator Weaver did not provide probable cause for the issuance of the warrants because they contain only conclusory statements that a crime had been committed, and because the information given the judge was not the first-hand knowledge of the affiant. We cannot agree with either contention.

In determining whether supportive evidence of a crime exists, the question to be asked is whether the issuing judge was provided sufficient evidence to make an independent finding of probable cause for the issuance of the warrants. The United States Supreme Court has suggested that in making this determination on appeal "great deference" be given the findings of the issuing judge, that he not be "confined by niggardly limitations," and that "probability" rather than proof be the standard for probable cause.[1]

Applying these standards of review, we cannot agree with Davis that the affidavit contained only the conclusory asser-

[1] *Spinelli* v. *United States*, 393 U.S. 410, 419, 21 L. Ed. 2d 637, 645 (1969) (citations omitted).

tion that the Polar Bar had been burglarized. Investigator Weaver averred that his own investigation "revealed that the safe above described was the one stolen from the Polar Bar." Such a statement enabled the district judge to conclude without inferring undisclosed facts that the affiant had personal knowledge of the stolen safe. There is no informant hearsay connected with the actual commission of the burglary. The scene of the crime was investigated by an officer under the direct supervision of the affiant. The police work described in the affidavit indicates that the police had already invested a substantial number of man hours on the assumption that a crime had been committed. The discovery of the broken safe is itself independently suggestive of a crime.

Investigator Weaver's statements are not mere assertions of belief or suspicions that a crime had been committed. They are facts and circumstances which cumulatively go far toward establishing the existence of a burglary, and toward providing the basis for the judge's independent determination that probable cause existed.

Moreover, a substantial portion of the information given to the district judge was the personal work product of the affiant. He averred that he personally had interviewed the juvenile, and that his own investigation had corroborated the youthful witness' statement that Davis was in possession of a metallic blue Chevrolet shortly after the burglary. He further averred that both the juvenile and the rental agent had selected Davis' photograph from a group of five photographs of adult black males wearing mustaches. The nature and quantity of supportive evidence in the affidavit readily distinguish the present case from the case upon which Davis relies, *Giordenello* v. *United States*,[2] where the affidavit contained only conclusory statements.

Davis next contends that the information obtained from the witnesses and alleged in the affidavit was hearsay, and that the affidavit neither alleges the reliability of those informants, nor independently corroborates their statements as required by *Aguilar* v. *Texas* [3] and *Jones* v. *United States*.[4]

While reliance upon hearsay does not change the standards of probable cause, it does add to the burden which must be met

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[2] 357 U.S. 480, 2 L. Ed. 2d 1403 (1958).
[3] 378 U.S. 108, 12 L. Ed. 2d 723 (1964).
[4] 362 U.S. 257, 4 L. Ed. 2d 697 (1960).

by the affiant. The information must be based on the personal observations of the informant, and not his suspicions, beliefs, or some form of double hearsay.[5] Absent any affirmative allegation of personal knowledge of the informant in the affidavit, the facts supplied must be so detailed as to support an inference of personal knowledge.[6] In addition, the judge "must be informed of some of the underlying circumstances * * * from which the [affiant] concluded that the informant * * * was 'credible' or his information 'reliable.'"[7] This reliability might be established by demonstrating past reliability,[8] by independent corroboration of incriminating facts by the police,[9] or through the personal identity and involvement of the person giving the information.[10]

In the instant case, both statements by the witnesses were independently corroborated by the preliminary police investigation. The officers determined that the man whom the juvenile witness had described had rented a car which the youth had also described. The witness later identified the picture of the man whose name the police had obtained from another source. Similarly, the automobile rental agent described the man and identified a photograph. Each independent identification strengthened the other in the sense of making each witness' information more reliable, and enhancing the probability that his information was credible.

Also, the hearsay evidence in the present case can be viewed less suspiciously because it does not offer information about a crime per se, nor does it establish the existence of the crime. It is informative rather than accusative; supplemental rather than essential. The police were independently aware of the

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[5] *Spinelli* v. *United States*, 393 U.S. 410, 416, 21 L. Ed. 2d 637, 644 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 113, 12 L. Ed. 2d 723, 728 (1964); *United States* v. *Roth*, 391 F. 2d 507 (7th Cir. 1967).

[6] *Spinelli* v. *United States*, 393 U.S. 410, 416, 21 L. Ed. 2d 637, 644 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 113, 12 L. Ed. 2d 723, 728 (1964); *United States* v. *Davis*, 402 F. 2d 171 (7th Cir. 1968).

[7] *Aguilar* v. *Texas*, 378 U.S. 108, 114–15, 12 L. Ed. 2d 723, 729 (1964) (citations omitted). *See also United States* v. *Harris*, — U.S. —, 29 L. Ed. 2d 723 (1971).

[8] *E.g.*, *Smith* v. *United States*, 358 F. 2d 833, 835 (D.C. Cir. 1966).

[9] *Spinelli* v. *United States*, 393 U.S. 410, 417–18, 21 L. Ed. 2d 637, 644 (1969).

[10] *Pendergrast* v. *United States*, 416 F. 2d 776, 785 (D.C. —), *cert. denied*, 396 U.S. 926, 23 L. Ed. 2d 243 (1969); *McCreary* v. *Sigler*, 406 F. 2d 1264, 1269 (8th Cir. 1969).

commission of a crime. Nothing in the hearsay accused Davis of having committed that crime. The connection between the hearsay descriptions and identifications, and the fact of a crime, is the result of the investigator's deductive reasoning. This reasoning is clearly set forth in the affidavit for the independent scrutiny of the issuing judge.

For these reasons we cannot find that the affidavit for the warrants was deficient.

The search warrants obtained from the above affidavit were executed that same day, February 18, 1970. Although Davis contends in a single sentence that the search was conducted in bad faith, there is no evidence to support that claim. The officers knocked at the door for some time. When no one answered they went across the alley to get a key from the landlord. As they were unlocking the door, Davis opened it from the inside. They showed their warrants, arrested Davis and began the search. The car was towed to the police station in order to conduct a more thorough search for safe insulation fibers and other evidence. There is no evidence or testimony indicating that the officers abused their authority in conducting the search.

Davis argues further, however, that the warrants were not sufficiently particular to justify the seizure of all the items which were involved. The automobile warrant authorized the seizure of

> certain property described as evidence of the burglary and larceny * * * including fibers matching those found at the crime scene, debris matching that found on the safe held as evidence in this case, paint flecks matching paint on the safe, tools and other evidence relating to the commission of the above described offenses * * *.

The premises warrant authorized the seizure of

> certain property described as evidence of the crime of burglary and grand larceny * * * including a cruved [sic] handled crowbar, a brown mackinaw, boots or shoes with safe insulation fibers imbedded therein, and other evidence of the commission of the crime above described * * *.

Noting that the warrants authorized the seizure of "other evidence," Davis contends that both warrants fail to describe particularly the property to be seized, and thus must fail as general warrants.

We cannot agree that this language gives the executing officer "blanket authority" and leaves to him a "subjective determination" of the scope and intensity of the search. We consider that the addition of the "other evidence" language reaffirms rather than broadens the scope of the search authorized by the listed and particularized items.

Stanford v. *Texas*,[11] cited by Davis, is readily distinguishable. That case turned largely on first amendment considerations. In the instant case, no published materials have been seized, nor ideas repressed. No first amendment threats are posed. Similarly, *Rice* v. *United States*[12] is distinguishable from the instant case. In that case the warrant gave absolutely no description of the property to be seized. The reviewing court held it defective for failing to describe "even in the most general way" the items subject to seizure.

Davis also argues that the warrants failed to meet the test announced in *Bell* v. *State*, where we held that:

> [A]n officer may seize evidence of a crime even though such property is not particularly described in the search warrant when the objects discovered and seized are reasonably related to the offense in question, when the searching officer at the time of the seizure has a reasonable basis for drawing a connection between the observed objects and the crime which furnished the basis for the search warrant, and the discovery of such property is made in the course of a good faith search conducted within the authorized perimeters of the search warrant.[13]

A perusal of the inventoried items[14] seized in the present case convinces us that the evidence seized was all within the limits

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[11] 379 U.S. 476, 13 L. Ed. 2d 431 (1965).

[12] 24 F. 2d 479, 480 (1st Cir. 1928).

[13] 482 P. 2d 854, 860 (Alaska 1971) (footnote omitted).

[14] The inventoried items from the two warrants were: one vial suspected marijuana; twenty-one dollars currency; a car contract and receipt; a cigarette holder; a packet of checks and driver's license blanks; a folder of miscellaneous identification; a pair of tan boots; a knotted silk stocking; a bag of white substance; a pair of brown trousers; a pair of light tan trousers; two pairs of brown coveralls; a Colt .45 automatic revolver with no serial number or clip; a plaid overcoat; four bags of vacuum cleaner debris; a piece of rope; four bags of paint samples; three floor mats; one tire iron; and three pieces of cardboard.

of our ruling in *Bell*.[15] All of the items used at trial were either particularly described in the warrants or were sufficiently related to the crime, the listed evidence, and the purpose of the search to satisfy the requirements of *Bell*.

II

Davis next contends that he was denied his right to counsel during a lineup identification, evidence of which was admitted at trial. Davis further contends that his in-court identification was thereby tainted.

At approximately 10:00 a.m. on February 19, 1970, Assistant District Attorney Richard R. Felton contacted Herbert D. Soll of the Public Defender Agency to inform him that a lineup would be held that morning. While the Public Defender Agency was representing both Davis and Leonard, the other suspect, Soll was not assigned to either suspect. He was filling in at the time and claimed at trial that his recollection of what transpired was hazy because of his limited involvement in the cases.

There is conflict in the court testimony concerning whether Soll was representing both Davis and Leonard during the lineup, or whether he was representing only Leonard. According to Soll's testimony, only Leonard had requested the lineup. While confirming that Davis had been brought into the prelineup interview with Leonard, Soll testified repeatedly that he could not recall ever being aware that Davis was going to participate in the actual lineup.

Because the police had some difficulty finding mustachioed blacks for the witnesses to view with Leonard and Davis, the lineup was delayed until about noon. Soll had a prior engagement and was compelled to leave before the other subjects could be assembled. When Felton said that they would not proceed unless counsel was present, Soll agreed that the lineup which had been requested by Leonard could be held without him, and said he would send someone from his office to observe it. At no time did Soll see any of the participants in the lineup other than the two suspects, Leonard and Davis.

A college student-investigator attended the lineup for the Public Defender Agency. He had been working for the Public Defender Agency for about two months. He was a sociology

[15] We need not decide, for those items used at the burglary trial, whether or not the holding of *Bell* represents the upper limit on permissable seizures.

major at Alaska Methodist University and had no prior legal training. Soll testified that he instructed the student in the kinds of things to watch during the lineup. While certain that these instructions were given with respect to Leonard, Soll again testified that he could not recall that he was even aware that Davis was going to participate in the lineup.

The trial judge made no specific finding on the question of whether Davis was represented by counsel during the lineup. He merely determined

> that in spite of U.S. versus Wade that the defendant's rights were not prejudiced, that the lineup as held by the police was proper; the evidence was shown that it was proper, that Mr. Soll, although not representing either defendant, was there, although he may have on recollection believe [sic] that he was only there because of the other defendant, Leonard, Mr. Felton indicated that he was aware of both defendants and there was nothing to show that the lineup wasn't proper. I—I'm not following U.S. versus Wade technically or fully but I think the Supreme Court of the United States has receded somewhat from that very strict position.

We cannot agree with the ruling of the trial judge that the rights afforded a suspect by *United States* v. *Wade*[16] can be discounted so easily. In the companion case, *Gilbert* v. *California*,[17] the same right to counsel at lineup identifications was made applicable to the states through the fourteenth amendment.

However, we need not decide whether Davis was represented by counsel during the lineup because we find that the courtroom identification derived from a source independent of that lineup, and that the introduction of the lineup identification at trial was harmless error.

In *Wade* the Supreme Court said that the courtroom identification cannot be excluded

> without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.[18]

[16] 388 U.S. 218, 18 L. Ed. 2d 1149 (1967).
[17] 388 U.S. 263, 18 L. Ed. 2d 1178 (1967).
[18] 388 U.S. 218, 240, 18 L. Ed. 2d 1149, 1164 (1967).

The test to be applied is the same as that announced in *Wong Sun* v. *United States*:[19] whether "'the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[20] The *Wade* court then lists a number of factors to be considered in applying this test.[21]

In determining whether or not the courtroom identification was independent of the lineup, we must be mindful of the distinction between the "independent source" exception to the *Wade-Gilbert* right to counsel, and the "totality of circumstances" test which the same court applied in *Stovall* v. *Denno*[22] to pre-*Wade-Gilbert* lineups.

We feel compelled to draw a clear distinction between the two approaches because in this case the trial judge appears to have applied a "totality of circumstances" approach,[23] and because a number of other jurisdictions have obfuscated the "distinction between the protection offered by *Wade-Gilbert* right to counsel and the totality-of-circumstances criteria against which the courts measure a violation of due process in identification confrontations."[24] In evaluating evidence used at trial from a lineup without counsel, we are not merely concerned with the fundamental fairness of that lineup. We are also concerned with the need for counsel to be present in order to evaluate the circumstances and prepare his argument at trial sufficiently to provide the defendant with his sixth amendment

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[19] 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

[20] *United States* v. *Wade*, 388 U.S. at 241, 18 L. Ed. 2d at 1165, *quoting* *Wong Sun* v. *United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963), *quoting* Maguire, *Evidence of Guilt* 221 (1959).

[21] Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant, to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

388 U.S. at 241, 18 L. Ed 2d at 1165 (footnote omitted).

[22] 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206 (1967).

[23] See the quoted passage from the trial transcript in text accompanying note 16 *supra*.

[24] Note, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. Chi. L. Rev. 830, 833 n. 14 (1969).

right to confront identifying witnesses.[35] The fact that the Court did not make *Wade-Gilbert* retroactive suggests that they envisioned a change from prior identification requirements and protections. While the Court in *Stovall* said that it would consider the totality of circumstances surrounding the identification,[36] the same Court in *Wade* said that the circumstances and conduct of the lineup was only one of at least seven factors to be considered in applying the independent origin test.[37]

We note in the instant case that the juvenile witness had a prior opportunity to observe and talk with Davis at the Glenn Highway location, that he identified a picture of Davis prior to the lineup, and that there was no significant lapse of time between the alleged act and the lineup identification such that the lineup would have significantly refreshed and influenced his courtroom identification. We further note that there is no discrepancy between the pre-lineup description by the juvenile and the appearance of Davis. The youth had not erroneously identified any other person prior to the lineup, nor had he failed to identify Davis on any prior occasion. The earlier identifications coupled with the absence of such negative factors persuade us that the courtroom identification was independent of the lineup.

We also conclude that the use of the lineup evidence was harmless error. In *Love* v. *State* [38] we adopted a harmless error test which focuses on the substantiality of the effects of the error.[39] However, we also recognized at the time that the United States Supreme Court had rejected a substantiality test in

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[35] In *Wade* the court noted: "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." 388 U.S. at 235, 18 L. Ed. 2d at 1162.

[36] 388 U.S. at 302, 18 L. Ed. 2d at 1206.

[37] 388 U.S. at 241, 18 L. Ed. 2d at 1165. See note 21 *supra* for a listing of the particular factors to be considered.

[38] 457 P. 2d 622 (Alaska 1969).

[39] We stated that test to be the same as that adopted in *Kotteakos* v. *United States*, 328 U.S. 750, 90 L. Ed. 2d 1557 (1946), "that the judgment was not substantially swayed by the error." 457 P. 2d at 631. In *Roberts* v. *State*, 458 P. 2d 340, 342 (Alaska 1969), that test was stated as whether the error "appreciably affect[ed] the jury's determination of the appellant's guilt."

Chapman v. *California* [30] for all cases involving federal constitutional protections. Such is the case before us today; in order to hold harmless any error in the use of the lineup evidence, we "must be able to declare a belief that it was harmless beyond a reasonable doubt." [31]

In the instant case, the identification of Davis was crucial to the prosecution's case. However, we have already determined that the identification was independently established by the juvenile's encounter on the road, and by the later photographic identification. Moreover, it does not appear that the prosecution placed much emphasis on the lineup identification at trial. While a picture of the lineup was identified by the youth on the witness stand, that picture was never introduced as evidence. On the other hand, Davis' own counsel did dwell, in front of the jury, on the point of whether the youth's courtroom identification was independent of the lineup identification. Finally, the trial judge made no comment on any of the identification evidence.

Based on the independence of the identification evidence and the insignificant part the lineup played in the trial, we are convinced that the little exposure the jury had to the fact of the lineup was overshadowed by the other identification evidence, and had no probable effect in establishing the prosecution's case before the jury. Hence, we are able to declare that we believe beyond a reasonable doubt that any error was harmless error.

III

Davis next contends that the court erred in denying his motion for judgment of acquittal at the end of the prosecution's case. He argues that there was no evidence connecting him to the crimes of burglary and larceny; that at best he was placed at the scene of the later discovery of the safe; and that he was never seen in possession of the safe. Davis' motion at trial was based on the contention that mere circumstantial evidence of possession is insufficient to go to the jury or to sustain a conviction of burglary or larceny.

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[30] 386 U.S. 18, 17 L. Ed. 2d 705 (1967).

[31] *Chapman* v. *California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967); *accord*, *Bargas* v. *State*, 489 P. 2d 130, 133 (Alaska 1971); *Spaulding* v. *State*, 481 P. 2d 389, 392 (Alaska 1971); *Fresneda* v. *State*, 458 P. 2d 134, 145 (Alaska 1969); *Robert* v. *City of Fairbanks*, 456 P. 2d 470, 477–478 (Alaska 1969); *Thessen* v. *State*, 454 P. 2d 341, 350 (Alaska 1969).

It is well settled in this court that when an appellant challenges the sufficiency of the evidence supporting a verdict and judgment

> the judge must take the view of the evidence and the inferences therefrom most favorable to the state. If he determines that fair minded men in the exercise of reasonable judgment could differ on the question of whether guilt has been established beyond a reasonable doubt, then he must submit the case to the jury.[31]

In order to determine whether fair-minded men in the exercise of reasonable judgment could differ on the question of guilt, it is necessary to trace the path of reasoning which any fair-minded man must traverse to arrive at the conclusion of guilt of larceny and burglary beyond a reasonable doubt.

There is no direct evidence that Davis was at any time in possession of the safe. On the other hand, viewing the evidence "most favorable to the state," the circumstantial evidence of possession is quite persuasive. Davis was seen at the site of the broken safe with a crowbar in hand, and the fibers in the trunk of his car were the same substance which insulated the stolen safe. If this were an appeal from a charge and conviction for possession of stolen goods, we would have no difficulty concluding that this case "illustrates the high degree of certainty which can be achieved through circumstantial evidence," [32] and that because fair-minded men of reasonable judgment could differ on the question of guilt, the facts should be submitted to the jury.

But in this case it is not sufficient to infer possession alone in order to convict. The defendant is charged with larceny and burglary. The fair-minded men exercising reasonable judgment must infer the crimes of larceny and burglary from the inference of possession. Hence, this is a case which requires the pyramiding of an inference of theft upon an inference of possession. In the past we have cautioned that "building inference upon inference without adequate data" would present the very grave danger of a criminal conviction founded on speculation.[33] The facts of the instant case require a cautious analysis.

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[31] *Bush* v. *State*, 397 P. 2d 616, 618 (Alaska 1964) (footnote omitted). *Accord*, *Jordan* v. *State*, 481 P. 2d 383, 387 (Alaska 1971); *Allen* v. *State*, 420 P. 2d 465, 467 (Alaska 1966); *See Tarnef* v. *State*, 492 P. 2d 109, 116–117 (Alaska 1971).

[32] *Jordan* v. *State*, 481 P. 2d 383, 387 (Alaska 1971).

[33] *Davis* v. *State*, 369 P. 2d 879, 882–83 (Alaska 1962).

The evidence of possession of the safe in the instant case, though circumstantial, is comparable in persuasiveness to any direct evidence short of the defendant being caught with the safe in hand. Because the evidence of possession is so persuasive, we cannot conclude that the present case demands that double level of inference "without adequate data" which would present a danger of conviction founded on speculation. Thus we hold that the only significant inference required by the jury was the inference of burglary and larceny from possession.

Wigmore suggests that what is minimally required to permit an inference of theft from possession is that the possession be exclusive, unexplained, and fairly close in time to the commission of the crime.[25] The majority of jurisdictions which follow this rule have held that the questions of whether the possession was sufficiently recent and sufficiently exclusive to justify an inference of guilt are questions of fact for the jury.[26] Thus, according to our standard of sufficiency of the evidence, the judge should rule on the question of exclusivity as a matter of law only when the evidence that possession was not exclusive is so persuasive that fair-minded men exercising reasonable judgment could not differ with that conclusion.

Davis relies primarily upon *Davis* v. *State*,[27] where we held that where all the evidence of guilt is circumstantial, it is incumbent upon the state to produce evidence of circumstances excluding every reasonable hypothesis but that of guilt.[28] Davis argues that the evidence showing the presence, at the site where the safe was discovered, of another man whose role in the criminal act was never positively determined cast doubt upon the exclusivity of possession sufficient to require a granting of his motion for judgment or acquittal.

We cannot agree with Davis. The language in *Davis* v. *State* upon which he relies was specifically rejected in *Jordan* v. *State*.[29] We conclude that fair-minded men exercising reasonable judgment could conclude that Davis had the necessary exclusivity of control.

We hold, therefore, that the trial judge did not err in refusing to grant the motion for judgment of acquittal.

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[25] IX J. Wigmore, Evidence § 2513, at 422 (3d ed. 1940).

[26] *E.g.*, *State* v. *Downing*, 205 P. 2d 141, 145 (Ore. 1949). *See generally*, IX J. Wigmore, Evidence § 2513, at 422 (3d ed. 1940).

[27] 369 P. 2d 879 (Alaska 1962).

[28] *Id.* at 882.

[29] 481 P. 2d 383, 386–387 (Alaska 1971).

IV

Davis next urges that the trial judge erred in not permitting the defendant to cross-examine the juvenile witness concerning the nature of his prior juvenile record. Recognising that the majority of cases on impeachment of a witness by a juvenile record is against him,[40] the appellant wishes to distinguish his case. He claims not to be interested in impeaching the juvenile, but rather desires to show bias, prejudice or motive in that the witness was under pressure to shift suspicion from himself to another.

In *Whitton* v. *State*[41] the trial court refused to permit cross-examination of a witness to determine whether he was motivated to testify for the state by an expectation of immunity for his own criminal acts. We held that "when the primary objective of cross-examination is to establish bias, the fact that it may also be shown that the witness committed wrongful acts does not violate Civil Rule 43(g)(11)[b]."[42] We recognised that because the human tendency toward bias is so common, "reasonable latitude must be allowed in the cross-examination of a witness * * *."[43]

On the other hand the basis for the trial judge's decision was Rule 23 of the Alaska Rules of Children's Procedure,[44] which provides:

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[40] *E.G., In re* Nash, 393 P. 2d 405 (Cal. 1964) (juvenile record not admissible to impeach prosecuting witness absent special circumstances as where witness is an exploited prostitute in trial charging pimping and pandering); *Martinez* v. *Avila*, 415 P. 2d 59 (N.M. 1966) (juvenile record not to be elicited even where law permits cross-examination concerning "acts of misconduct" for impeachment); *State* v. *Wilson*, 465 P. 2d 413 (Wash. 1970) (juvenile record inadmissible because not "crime" as rules of evidence required for impeachment). *See generally*, cases cited in IIIA J. Wigmore, Evidence § 980, at n. 6 (rev. ed. 1970); C. McCormick, Handbook of the Law of Evidence § 43, at n. 16 (1954); Annot. 147 A.L.R. 443, 446 (1943). *But see State* v. *Searle*, 239 P. 2d 995 (Mont. 1952) (statement in juvenile proceeding inconsistent with statement as prosecuting witness admissible without violation of statutory ban of use "against the child").

[41] 479 P. 2d 302 (Alaska 1970).

[42] *Id.* at 317 (footnote omitted).

[43] *Id.*

[44] That rule is cross-referenced to AS 47.10.080(g) which in part provides: "The commitment and placement of a child and evidence given in the court are not admissible as evidence *against the minor* in a subsequent case or proceedings in any other court * * *." [Emphasis added.]

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a pre-sentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

In support of his argument against the lower court interpretation of Rule 23, Davis cites Wigmore:

> A judgment, in finding, or proceeding of deliquency in a juvenile court is by modern statutes forbidden to be used 'against the child' in any other court. It would be a blunder of policy to construe these statutes as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as witness in another court."

Wigmore illustrates his point with an example of a delinquent girl with nymphomaniac tendencies who testifies as prosecutrix in a case of rape or indecent liberties.

The instant case would appear to place the interest of protecting the anonymity of a juvenile transgressor in conflict with the interest of affording the defendant an adequate opportunity to confront adverse witnesses. However, while the judge did not permit questions directly disclosing the fact that the juvenile had a prior record, our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the juvenile in considerable detail concerning the possibility of bias or motive. Council alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension. The juvenile responded that he felt no anxiety or apprehension about the safe being discovered near his home. While this denial was possibly self-serving, the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the juvenile and pass on his credibility.

Given these indirect references, we cannot find error in the refusal to permit the introduction of direct evidence of the juvenile record.

" IIIA J. Wigmore, Evidence § 980, at 834 (rev. 3d. 1970). [Emphasis and cross-reference omitted.]

V

From a separate conviction, Davis brings another appeal which we have consolidated for purposes of decision.

Among those items seized during the search of the defendant's house was a Colt .45 automatic found under a dresser in one of the bedrooms. No clip was discovered but bullets were located in the closet of this same room. Davis was indicted for being a felon in possession of a concealable firearm, and was found guilty in a separate trial on that issue.

Davis first argues that the trial court erred in denying his motion to suppress the gun as illegally seized. He contends that the gun fails to come within the limits of *Bell* v. *State*.[46] We agree with Davis that the gun was not "reasonably related" to the burglary which was the crime for which the search was conducted. However, our inquiry does not end with such a conclusion. The general rule is that in conducting a search pursuant to a valid warrant only the items particularly described may be seized.[47] There are, however, exceptions to that rule. Our holding in *Bell* constitutes such an exception for it authorizes the seizure of an object not listed in the warrant but reasonably related to the offense in question when the officer has a reasonable basis for relating the object to that crime.[48] By way of dicta in *Bell*, we recognized other exceptions to the general rule requiring particularity.[49] Among those exceptions was one which authorizes[50] an officer who is conducting a good faith search pursuant to a valid warrant to seize objects in plain view[51] which he has a reasonable basis to believe are related to another crime which he has probable cause to believe is being committed in his presence.[52]

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[46] 462 P. 2d 854, 860 (1970). See discussion in accompanying text and notes 13–15 *supra*.

[47] U.S. Const. amend. IV; Alaska Const. art. I, § 14.

[48] *Accord, Gurleski* v. *United States*, 405 F. 2d 253, 257–260 (5th Cir. 1968), *cert. denied*, 395 U.S. 981, 23 L. Ed. 2d 769 (1969).

[49] 462 P. 2d at 859.

[50] The scope of the search authorized by the search warrant may not be exceeded.

[51] As was stated in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, 29 L. Ed. 2d 564, 582 (1971): "An example of the applicability of the plain view doctrine is the situation in which the police have a warrant to search a given area for specific objects, and in the course of the search come across some other article of incriminating character."

[52] *Aron* v. *United States*, 382 F. 2d 965, 973–974 (8th Cir. 1967); *Seymour* v. *United States*, 369 F. 2d 825, 827 (10th Cir. 1966), *cert. denied*, 386 U.S.

Footnote continued on next page.

Investigator Weaver testified at trial that he had found and seized the gun, and that he was aware of Davis' being a previously convicted felon. The gun had no serial number. Finding a gun with no serial number in the bedroom of the apartment of a man he knew to be a convicted felon gave the searching officer a reasonable basis to believe that the crime of felon in possession, to which the gun was reasonably related, was being committed in his presence. We therefore conclude that the trial court did not err in denying Davis' motion to suppress the gun.

Davis next argues that his possession of the gun was not sufficiently established. Davis' landlord testified at the trial that Davis was living in the apartment occasionally with his wife, occasionally with another woman, and that Davis received numerous visitors. He further testified that a woman who had been living there for approximately two months moved out about the time that Davis was arrested. He said that the woman was the type of person whom he would expect to carry a gun. Davis then testified that the woman had lived in the room where the gun was found, and that on one occasion he had seen her with a gun.

Davis argues that the standard of exclusivity required by *Davis* v. *State* [43] should also be required before there is evidence sufficient to send a charge of felon in possession to the jury. However guilt of this latter crime does not require actual possession. "Custody" or "control" [44] is sufficient.[45]

Davis also argues that because no clip was found for the au-

Footnote continued from previous page.

967, 18 L. Ed. 239 (1967); *Porter* v. *United States*, 335 F. 2d 602, 607-608 (9th Cir. 1964), *cert. denied*, 379 U.S. 983, 13 L. Ed. 2d 574 (1965); *United States* v. *Bisner*, 297 F. 2d 595, 597 (6th Cir.), *cert. denied*, 369 U.S. 830, 8 L. Ed. 2d 17 (1962). *See also United States* v. *De Pugh*, 452 F. 2d 915, 921 (10th Cir. 1971); *United States* v. *Henkel*, 451 F. 2d 777, 780-781 (3d Cir. 1971); *United States* v. *Honore*, 450 F. 2d 31, 33 (9th Cir. 1971); *Anglin* v. *Director*, Patuxent Institution, 439 F. 2d 1342, 1346-1348 (4th Cir.), *cert denied*, —— U.S. ——, 30 L. Ed. 2d 262 (1971); *Johnson* v. *United States*, 296 F. 2d 539, 540 (D.C. Cir. 1961), *cert. denied*, 375 U.S. 888, 11 L. Ed. 2d 118 (1963); *State* v. *Johnson*, 10 Crim. L. Rptr. 2388 (Conn. Jan. 25, 1972). *Contra*, *United States* v. *Dzialak*, 441 F. 2d 212, 216-217 (2d Cir.), *cert denied*, —— U.S. ——, 30 L. Ed. 2d 165 (1971).

[43] 369 P. 2d 879 (Alaska 1962).

[44] Knowledge is a prerequisite to possession, control or custody. *Egner* v. *State*, Op. No. 784 (Alaska April 17, 1972). Davis raises no contention that he lacked the necessary knowledge.

[45] AS 11.55.080. *Cf.*, *State* v. *Porter*, 443 P. 2d 360, 363 (Kan.), *cert. denied*, 393 U.S. 1108, 21 L. Ed. 2d 805 (1968); *People* v. *Britton*, 118 N.Y.S. 989, 993 (Sup. Ct. 1909), "If physical possession was required, the words 'custody,

tomatic revolver, it could not be used and therefore cannot be called a weapon under the law. We take judicial note of the fact that the absence of a clip is not a mechanical defect rendering the pistol inoperable. The weapon could still be single-loaded with the bullets that were close at hand.

Little more need be said than that case law almost unanimously supports the propositions that conviction of "felon in possession" may be based on circumstantial evidence of possession or custody,[56] and that a revolver need not be fully assembled or immediately capable of firing in order to qualify as a weapon.[57] The purpose of the felon in possession statute is to prevent the concealment and use of firearms in violent crime. It is immaterial whether the gun is loaded and ready for immediate use. If such were the requirement, the law could easily be circumvented by maintaining custody of an unloaded gun while hiding the bullets until needed.[58]

We find no reversible error in the rulings of the court below, and we affirm the verdicts.

RABINOWITZ, Justice, dissenting in part, concurring in part.

I concur in the court's holding that Davis' conviction of the crime of felon in possession should be affirmed. On the other hand, I cannot agree that Davis' convictions of the crimes of burglary not in a dwelling and grand larceny can be upheld. For my view, the trial court erred in granting the prosecution's motion for a protective order which had the impact of precluding Davis' counsel from effectively cross-examining a key juvenile witness for the government.

Given Davis' constitutional rights, under both the Alaska and Federal Constitutions to confront adverse witnesses against him and the quality of the prosecution's totally circumstantial case against Davis, the trial court's erroneous curtailment of cross-examination of this crucial juvenile witness cannot be characterized as harmless error under either *Love* v. *State*, 457, P. 2d 622 (Alaska 1969), or *Chapman* v. *California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967), differing standards for determination of harmless error.

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or control' are meaningless, and plainly those words are not used synonymously with 'possession.' * * * One may * * * exercise control over what is not in his physical possession * * *."

[56] *E.g.*, *State* v. *Clipston*, 473 P. 2d 682, 687 (Ore. App. 1970).

[57] *People* v. *Ekberg*, 211 P. 2d 316 (Cal. App.), *cert. denied*, 339 U.S. 969, 94 L. Ed. 1377 (1949).

[58] *See State* v. *Quail*, 92 A. 859 (Del. Ct. Gen. Sess. 1914).

In the case at bar, counsel for Davis sought to show on cross-examination that at the time of trial the state's juvenile witness was still under probation supervision for the crime of burglary. Counsel for Davis wanted to elicit this fact for the purpose of showing the witness's bias as well as his motive in giving testimony for the prosecution. In regard to the cross-examination of a witness as to his bias or motive, in *RLR* v. *State*, 487 P. 2d 27, 44 (Alaska 1971), we said that:

> "[G]reat liberality should be given defense counsel in cross-examination of a prosecution witness with respect to his motive for testifying." Cross-examination to show bias because of expectation of immunity from prosecution is one of the safeguards essential to a fair trial, and undue limitation on such cross-examination is reversible error without any need for a showing of prejudice (footnotes omitted).[39]

In the case at bar, the majority believes that Davis' constitutional right of confrontation was satisfied because his counsel "alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension." In my view, this falls far short of the confrontation rights guaranteed Davis. Vague speculations concerning ulterior motives and the possibility that the juvenile witness's identification of Davis arose from apprehension are hardly adequate substitutes for bringing home to the jury the fact that the juvenile witness was on probation for burglary at the time he testified. The right of confrontation required that Davis be permitted to show that the witness was on probation for burglary and also encompassed the right to inquire into the circumstances of the witness's relations with the police.

I find the majority's reliance upon Rule 23, Alaska Rules of Children's Procedure, inapposite here. The accused's fundamental right to confront adverse witnesses against him outweighs any interest in protecting a juvenile witness from disclosure of his prior adjudication of delinquency and from dis-

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[39] *See also Doe* v. *State*, 487 P. 2d 47, 58 (Alaska 1971) where we said that the right of liberal cross-examination of a witness as to his bias is well established. In *Whitton* v. *State*, 479 P. 2d 302, 317 (Alaska 1970), in recognizing that reasonable latitude must be allowed in the cross-examination of a witness, we said that "when the primary objective of cross-examination is to establish bias, the fact that it may also be shown that the witness committed wrongful acts does not violate Civil Rule 43(g)(11)[b]."

closure of the disposition order.[9] In light of this court's stated preference for liberality of cross-examination of a prosecution witness with respect to his motive or bias in testifying, I reach the conclusion that in the case at bar Davis' rights of confrontation were improperly curtailed.[11] I therefore conclude that Davis must be given a new trial as to the separate offenses of burglary not in a dwelling and grand larceny.

Supreme Court of the United States

No. 72–5794

JOSHAWAY DAVIS, PETITIONER

v.

ALASKA

On petition for writ of certiorari to the ..... Supreme Court of the State of Alaska.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted

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[9] Rule 23, Alaska Rules of Children's Procedure, provides: "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate."

Rule 23, Alaska Rules of Children's Procedure, is more expansive than its statutory counterpart. AS 47.10.080(g), which in part provides: "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court * * *."

As we said in *RLR* v. *State*, 487 P. 2d 27, 37 (Alaska 1971), "These social policy considerations [dictating anonymity in children's proceedings] are based on empirical propositions which may be false and have not been tested" (footnote omitted).

[11] I am in agreement with Professor Wigmore's view: "It would be a blunder of policy to construe these statutes [AS 47.10.080(g) and similar statutes] as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as a witness in another court."

IIIA J. Wigmore, *Evidence* § 980, at 834 (rev. ed. 1970).

limited to Question 1 presented by the petition which reads as follows:

1. Did the trial court err in not permitting cross-examination of chief identification witness Green concerning the nature of his juvenile record to bring before the jury the fact that Green was himself on probation for burglary at the time of the identification, thereby denying petitioner his Sixth Amendment right to confrontation?

FEBRUARY 20, 1973.

AMICUS CURIAE BRIEF

In the
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,
APPELLANT,

v.

ALASKA,
APPELLEE.

MOTION FOR LEAVE TO FILE A BRIEF FOR ARTHUR BEMBURY AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ARTHUR BEMBURY.

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In the

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,

APPELLANT,

v.

ALASKA,

APPELLEE.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF ALASKA

MOTION FOR LEAVE TO FILE A BRIEF FOR ARTHUR BEMBURY AS AMICUS CURIAE

Arthur Bembury respectfully moves for leave to file a brief as *amicus curiae* in support of the appellant in this case. The consent of the attorney for the appellant has been obtained and filed with the Clerk. The consent of the Attorney General of Alaska was requested, but no final decision on this request has been received.

Mr. Bembury has been convicted of murder in the second degree and sentenced to imprisonment for life. An appeal from that conviction to the Supreme Judicial Court of Massachusetts is pending. As will more fully appear in Section I of the brief submitted herewith and in Appen-

dix A of the brief,[1] the direct interest of the *amicus* is that the disposition of this case will in all probability determine the result of his appeal.

While the petitioner in *Davis* v. *Alaska* raises the question of the use of juvenile records to show bias or interest on the part of a prosecution witness, the *amicus's* case involves the admissibility of juvenile records primarily to impeach the credibility of the key government witness in a case where credibilty was decisive, and only secondarily the admissibility of such records to show an interest. These two questions are obviously substantially similar and involve many of the same considerations. Moreover, the factual configuration in the *amicus's* case raises the question whether a prohibition on the use of juvenile records denied the defendant a fair trial.

Because the issues raised by the apellant and by the *amicus*, although virtually identical, have a slightly different focus, it is respectfully submitted that the brief of the *amicus* will enable the Court to properly consider all dimensions of the issue such that its opinion in this case will provide more guidance for the state and lower federal courts.

Respectfully submitted,

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Thomas G. Shapiro
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45 School Street
Boston, Massachusetts 02108
Attorneys for
Arthur Bembury, Amicus

[1] The motion reproduced as Appendix A was submitted after a previous motion praying for leave to impeach the credibility of the witness by introduction of her juvenile records had been denied by the trial court.

In the

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5794.

DAVIS,

APPELLANT,

v.

ALASKA,

APPELLEE.

BRIEF AMICUS CURIAE OF ARTHUR BEMBURY

Interest of Amicus

The *amicus*, Arthur Bembury, was convicted of murder in the second degree in June, 1971, and his appeal from that conviction is presently pending before the Supreme Judicial Court of Massachusetts.

A brief statement of the nature of his trial will indicate his interest as an *amicus*. The principal witness against the defendant was the 15-year-old daughter of the deceased and was the defendant's girlfriend until shortly prior to the alleged offense. She testified, *inter alia*, that she heard the defendant speaking with her mother (the deceased) in the vestibule of her home, her mother said, "go ahead and shoot," and she heard a shot. In short, she gave direct evidence, and the only direct evidence, that the defendant committed the murder. The defendant testified, denying

that he committed the offense. The relative credibility of the defendant and this witness was the main issue at the trial.

The defendant was not permitted to impeach the witness by introduction of her juvenile record, which was believed to include an adjudication of delinquency for robbery, and adjudications for runaway and for prostitution on several occasions. On the other hand, the defendant's credibility, over objection, was impeached by the introduction of a conviction for unlawful possession of a firearm.

The defendant was also prohibited from showing on cross-examination that the witness was not married, as claimed, and that she had misrepresented the date of birth of her child in order to delay the trial so that she could testify after delivery rather than while over eight months pregnant. The purpose of all such cross-examination was, primarily, to impeach the witness's credibility, and further to present evidence to support the defendant's theory that the witness had motive to and in fact did commit the offense herself. These matters are more fully set out in a motion filed by the *amicus* in his trial which is reprinted herein as Appendix A.

The *amicus*, therefore, has a direct interest in this Court's determination of the question whether a defendant's right of confrontation is impermissibly restricted by prohibiting impeachment by the introduction of a principal government witness's juvenile record.

Argument

The Rights of Confrontation and of a Fair Trial Are Impermissibly Infringed by a Blanket Prohibition on the Use of Juvenile Records To Impeach the Credibility of a Key Prosecution Witness.

This Court has but recently reaffirmed the importance of the right of cross-examination, which is an essential

element in the constitutional right of confrontation. *Chambers* v. *Mississippi*, 93 S.Ct. 1038, 1046 (1973). It is "an essential and fundamental requirement for" a fair trial. *Id.*, quoting from *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965). See also *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Alford* v. *United States*, 282 U.S. 687, 692-94 (1931); *United States* v. *Masino*, 275 F.2d 129, 132-33 (2 Cir., 1960).

It is also well settled that state rules of evidence based upon valid state concerns cannot automatically justify an infringement of these basic constitutional rights. *E.g.*, *Chambers* v. *Mississippi*, *supra*; *Brooks* v. *Tennessee*, 406 U.S. 605 (1972); *Lisenba* v. *California*, 314 U.S. 219, 236 (1941); *Bonner* v. *Beto*, 373 F.2d 301 (5 Cir., 1967). In *Hamburg* v. *State*, 248 So.2d 430, 434 (Miss., 1971), the Supreme Court of Mississippi held:

> "We are of the opinion that the broad fundamental right of an accused to cross-examine his accuser transcends the right the juvenile has to keep secret his former delinquent activity."

This is particularly so where the evidence sought to be elicited on cross-examination is favorable to the accused. See *Giles* v. *Maryland*, 386 U.S. 66 (1966).

This Court but recently recognized that where the "denial or significant diminution" of the right of confrontation is occasioned by a state rule of evidence, it is the duty of this Court to "closely examine[ ]" the competing interest. *Chambers* v. *Mississippi*, *supra*, at 1046. It is respectfully submitted that any state interest in excluding evidence of a prosecution witness's juvenile record cannot bear such examination.

The primary state interest is indicated by the fact that

most state statutes on the subject prohibit the use of juvenile records "against the child". See, *e.g.*, Massachusetts General Laws, Chapter 119, Section 60; District of Columbia Code 1961, §11-918; and the statutes in *People* v. *Smallwood*, 306 Mich. 49, 10 N.W.2d 303, 304 (1943); *Hamburg* v. *State*, 248 So.2d 430, 433 (Miss., 1971); *State* v. *Searle*, 125 Mont. 467, 239 P.2d 995, 998 (1952); *State* v. *Hale*, 21 Ohio App.2d 207, 256 N.E.2d 239, 243 (1969). When the juvenile is a witness, and not a party to the proceeding, the purpose of such statutes, and the purpose of the underlying state interest, is not defeated by permitting use of juvenile records to impeach the witness's credibility. *State* v. *Searle*, *supra*, at 998. Moreover, use of juvenile records for this purpose is to impeach credibility, not to impeach character, and it is the character of the juvenile that the statutes are designed to safeguard. *People* v. *Smallwood*, *supra*, at 305. In federal cases, the trial judge is now properly given discretion relative to the admission of juvenile records of a witness. Rules of Evidence for United States Courts and Magistrates, Rule 609(d). See 93 S.Ct. No. 5 (January 1, 1973).

The lack of a substantial state interest against the admissibility of such records is further indicated by the numerous decisions permitting their introduction in view of particular circumstances, or permitting the underlying facts to be introduced while not the records themselves. See, *e.g.*, *State* v. *Homolka*, 158 Kan. 22, 145 P.2d 156 (1944) (not error to permit introduction of juvenile record of defendant since defendant used a juvenile record against a government witness); *State* v. *Hale*, 21 Ohio App.2d 207, 256 N.E. 2d 239 (1969) (juvenile record introduced against defendant in violation of terms of a statute not error where defendant put his good character in issue); *State* v. *Frayer*, 17 Utah2d 968, 409 P.2d 968 (Utah, 1966) (cross-examination of defendant as to prior juvenile record permissible

where defendant testified as to his "haloed history" and actual records of the juvenile court not used); *People* v. *Vidal*, 26 N.Y.2d 249, 257 N.E. 2d 886, 889 (1970) (underlying acts of defendant committed while a juvenile may be used to impeach although juvenile adjudication based on such facts may not).[2]

Many of the cases holding that juvenile records may not be used to impeach credibility are distinguishable in that they involved the use of such records against defendants. As the Rules of Evidence for United States Courts and Magistrates, Rule 609(d), recognize, very different considerations are involved with defendants as opposed to witnesses.

As in *Hamburg* v. *State*, *supra*, the Supreme Court of Utah has also recognized that the exclusion of a juvenile record from the evidence may result in a miscarriage of justice. In *State* v. *Frayer*, 17 Utah 2d 268, 409 P.2d 968 (1966), the court observed that to prevent cross-examination as to a juvenile whose testimony was designed to paint a spotless history of himself "would be jurisprudentially naive and most unfair in the judicial administration of criminal justice". 409 P.2d, at 970.

When the government presents a witness, regardless of the presence or absence of specific testimony on his or her good character, the witness bears the imprimatur of the government and his or her testimony carries with it the implicit representation of the government that the testimony is truthful. To keep from the jury evidence tending to impeach the witness's credibility is equally "unfair" to the administration of criminal justice.

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[2] The question as to whether the juvenile record of a defendant may be introduced to impeach him or her at his or her own criminal trial is of course not presently before this court, and we do not urge that that be permitted except, perhaps, in the *Homolka* situation.

Conclusion

For the reasons above stated, it is apparent that the considerations involved in the prohibitions in most state statutes against use of juvenile records stem from a salutary purpose not to permit the records of juveniles to follow them through their lives to their injury. However, when a juvenile is not directly a party to a criminal case and when cross-examination to the credibility or to the interest of the juvenile is restricted by the prohibition, there is a greater interest in confrontation, which is protected by the Sixth and Fourteenth Amendments to the Constitution of the United States. It is respectfully submitted that this Court, in the case before it, should adequately protect the constitutional interest.

Respectfully submitted,

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Arthur Bembury.

APPENDIX A

DEFENDANT'S MOTION TO STRIKE OR FOR ALTERNATIVE RELIEF

The defendant moves that all of the testimony of the witness Faye French, also known as Faye Simmons be stricken on the grounds that by reason of the following her testimony cannot be believed and the defendant has been denied due process of law by the reception of her testimony in evidence and the limitation placed upon cross-examination of the witness by the court:

1. In this court on June 23, 1971, the witness testified in substance that when she saw the defendant following his being brought in handcuffs to 37 Schuyler Street after Mrs. Simmons, the deceased, had been shot, she asked the defendant, "Why did you do it?" to which he responded, "But I love you." At a hearing in the Municipal Court of the Roxbury District on March 9, 1970, the witness testified under oath that when she came in the back of the house the defendant was in the kitchen with police officers and she was further asked the following questions and gave the following answers:

Q. At that time, did you hear the defendant tell the police or did the defendant tell you that he had not shot your mother? A. No.

Q. Now, did you ask the defendant whether he had shot your mother? A. I didn't ask him anything.

Q. You didn't say anything to him at all? A. No.

2. That when this case was called for trial on April 21, 1971 the witness or someone on her behalf communicated to the district attorney that she had been delivered of a child on that morning or the morning before and that the records of the City of Boston as to births and deaths show that on May 1, 1971, the witness was delivered of a child, "Nicole".

3. That the witness testified that she was married in Providence, Rhode Island on May 9, 1971 to one Richard French, that the signer of this motion is informed and believes, upon the basis of information received from the City Clerk of the City of Providence, Rhode Island, and therefore avers that there is no record of a marriage between Faye Simmons and Richard French at any time during the month of May in Providence, that the only record of marriage of a person named Simmons is a record of the marriage of one Wendy Simmons to one Patriarca, that Rhode Island law requires parental consent to the marriage of a female under the age of 18 and that, as to marriages of females under the age of 16, that Rhode Island law requires that the marriage be approved after petition to the Family Court, that Faye Simmons was born on June 6, 1955 and was therefore on May 9, 1971, fifteen years of age, and under the age of sixteen.

4. That the defendant is informed and believes and therefore avers that the said Faye Simmons was reported to the Boston Police as a missing person twice during the year 1968, that she has been the subject of proceedings in the Boston Juvenile Court involving allegations of the following conduct on her part, prostitution, unarmed robbery and runaway, but that the undersigned is unaware because of the requirements of law of the exact details of such proceedings.

5. That if the witness testifies falsely under oath as to such matters as her marital status and if, as it appears, she misrepresents or causes to be misrepresented the date of birth of her child, knowing that such misrepresentation will cause delay in a trial in which she is to be a witness, her credibility of matters material to this case is most seriously in question but that the jury is unable to form upon the basis of the evidence before them a complete judgment on whether or not the witness is credible.

And the defendant further moves if this Court does not strike the testimony of the witness, that counsel be permitted to recall the witness and to cross-examine her on these and other matters as to which his cross-examination has been limited.

And the defendant further moves that any and all juvenile court records or copies thereof in the possession of the Court be marked for identification as exhibits in this case and be thereafter impounded, subject only to the examination of this Court and any other Court of the Commonwealth.

By his attorney,
(s) WILLIAM P. HOMANS, JR.
WILLIAM P. HOMANS, JR.

SUFFOLK, ss. Boston, Massachusetts
June 24, 1971

Then personally appeared the above-named WILLIAM P. HOMANS, JR. and made oath as to the truth of the above statements, except such as are stated to be upon information and belief, and, as to them, that he believes them to be true.

(s) NOTARY PUBLIC
Notary Public
My Commission Expires:

PETITIONERS' BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5794

JOSHAWAY DAVIS,

Petitioner,

v.

STATE OF ALASKA,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALASKA

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Constitutional Provisions:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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PETITIONER'S BRIEF

OPINION BELOW

The opinion of the Supreme Court of Alaska affirming petitioner's conviction is reported at 499 P.2d 1025 (1972), was handed down on July 28, 1972, and the mandate issued on September 13, 1972. The Supreme

Court of Alaska opinion in *Davis v. State* is also set forth in the Appendix at pages 45-66.

JURISDICTION

Petition for a Writ of Certiorari was filed on November 30, 1972, and certiorari was granted on February 20, 1973. This court's jurisdiction is evoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES INVOLVED

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute 11.20.100:

Burglary not in dwelling house. A person who breaks and enters a building within the curtilage of a dwelling house but not forming a part of it, or who breaks and enters a building or part of it, or a booth, tent, railway car, vessel, boat or other structure or erection in which property is kept, with intent to steal or commit a felony in it, is guilty of burglary, and upon conviction is punishable by imprisonment in the penitentiary for not less than two nor more than five years.

Alaska Statute 11.20.140:

Larceny of money or property. A person who steals money, goods, or chattels, or a government note, a bank note, promissory note, bill of exchange, bond, or other thing in action, or a book of accounts, order or certificate concerning money or goods due or to become due or to be delivered, or a deed or writing containing a conveyance of land or interest in land, or a bill of sale, or writing containing a conveyance of goods or chattels or interest in them, or any other valuable contract in force, or a receipt, release or defeasance, or a writ, process, or public record, which is the property of another, is guilty of larceny. Upon conviction, if the property stolen exceeds $100 in value, a person guilty of larceny is punishable by imprisonment in the penitentiary for not less than one nor more than 10 years. If the property stolen does not exceed $100 in value, the person, upon conviction, is punishable by imprisonment in a jail for not less than one month nor more than one year, or by a fine of not less than $25 nor more than $100.

Alaska Statute 47.10.080:

Judgments and orders. (g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

Alaska Rules of Juvenile Procedure, Rule 23:

Adjudications, Orders, and Dispositions Inadmissible. No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Alaska Civil Rule 43(g)(11)b:

Impeachment by Adverse Party. A witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief. He may not be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or the record of a judgment that he has been convicted of a crime.

QUESTION PRESENTED FOR REVIEW

Must the statutory anonymity given juvenile court records accede to the Sixth Amendment confrontation rights of the accused when a juvenile is testifying for the prosecution in a criminal action?

SUMMARY OF ARGUMENT

Chief prosecution identification witness Richard Green was on probation to the juvenile court for burglary. A burglarized safe was found on his property, and Green testified that he had seen petitioner earlier in the day standing near where the safe was found. Green initially identified petitioner from a series of pictures shown him at the Anchorage City Police Station. The circumstances of this show up were inherently coercive inasmuch as it took place in a small room in the presence of four police detectives, one of whom was packaging pistols.

Petitioner was arrested and paint chips and insulation fibers that "could have originated" from the stolen safe were found in the trunk of his rented car. No other evidence of an incriminating nature was obtained or presented.

The trial of the case was centered upon Green's identification. Petitioner was precluded by a protective order issued by the trial court from revealing Green's juvenile record and circumstances of probation to the jury to show that Green was under apprehension and had self interest in making the identification.

The origins of the Sixth Amendment's guarantee of cross examination have ancient roots. *Wigmore*, Vol. V, Sec. 1395, pp. 122-24 (3rd ed.). In a long line of cases this Court has recognized the right of cross examination to be essential for a fair trial and applicable to the states. *Pointer v. Texas*, 380 U.S. 400 (1965). This Court has

also ruled that the accused has the right to place prosecution witnesses in their proper setting and the trial court has no authority to limit cross examination to protect a witness save when the Fifth Amendment is invoked. *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1968). Evidentiary rules concerning the protection of juvenile records from disclosure were created only to protect the juvenile in actions against him and necessarily must yield to the Sixth Amendment rights of the accused.

Lower court decisions against petitioner's position are distinguishable in that confrontation was not an issue or was not discussed. Michigan and Mississippi courts have adopted rules supportive of petitioner's position. *Hamburg v. State*, 248 So.2d 430 (Miss. 1971); *People v. Davies*, 34 Mich. App. 19, 190 NW2d 694 (1971).

The trial court's protective order deprived petitioner of a fair trial. The error was not harmless as Green was concededly the essential witness at trial, and the remainder of the prosecution's case was weakly circumstantial.

STATEMENT OF THE CASE

Between the hours of 5 A.M. and noon on the 16th day of February 1970 the Polar Bar at Fifth Avenue and Eagle Street in Anchorage, Alaska was apparently burglarized (Tr. 101-02).[1] Among the various items stolen from the Polar Bar was a Mosler safe containing two payroll checks drawn from the account of Universal Services, Inc. in the approximate aggregate amount of $1,000.00 and about $500.00 in cash (Tr. 105, 117-18).

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[1] "Tr. ____" refers to the trial transcript, "A. ____" refers to the Appendix and "R. ____" to the record before the Alaska Supreme Court.

Witness Richard Green, a minor on probation for burglary (A. 4-22),[2] stated that around noon of the day in question he observed two black male persons standing near a metallic-colored Chevrolet sedan on his stepfather's property near Palmer, Alaska—approximately 30 miles north of Anchorage (A. 29, 30). The car was on an old road, and Green saw nothing suspicious in the incident (A. 40).

At approximately 5:00 P.M. on the same day a safe was discovered some three feet from where Green said he had observed the two black men (A. 27, 32, Tr. 298). The safe was not discovered by Richard Green (A. 27). The safe was later identified as the one allegedly taken from the Polar Bar. It had been broken into and the contents were never found (Tr. 103, 105-06, 282).

On the next day, February 17, 1970, Richard Green was taken to the Anchorage City Police Station in a police car where Investigator George Weaver conducted an interrogation and showed him various mug shots (Tr. 230) from which Green selected petitioner Joshaway Davis' photograph (Tr. 235-36). The identification took place in the police investigator's office, a room approximately 20 feet by 50 feet in size, with four detectives present. Investigator Weaver was packaging pistols at the time, and Richard Green was seated between Investigators Weaver and Gray and shown some six photographs which he viewed for about 30 seconds before he selected that of Joshaway Davis (Tr. 231-34).

Investigators Weaver and Gray then made a systematic check of the various auto rental agencies in Anchorage and found that a car approximating the description given

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[2]See also respondent's Opposition to Petition for Writ of Certiorari, p. 5.

by Green had been rented on February 12, 1970 by the Airways Rent-A-Car agency of Anchorage to Joshaway Davis (Tr. 226). George Weaver then made an affidavit before a state district judge for the issuance of a search warrant directed both at the residence occupied by Joshaway Davis and the rented car (R. 66-87). A search warrant was obtained and various clothing, papers and personal effects were seized from Davis' residence. The automobile was vacuumed for samples of debris and the trunk mat and tire iron were taken (Tr. 256). No cash or payroll checks were found in Davis' possession (Tr. 282).

Joshaway Davis was arrested contemporaneously with the execution of the search warrant (Tr. 240). Richard Green subsequently identified Joshaway Davis at a lineup (Tr. 1-57). On the 24th of February 1970 Joshaway Davis was indicted by an Anchorage grand jury upon one count of burglarizing the Polar Bar on February 16, 1970 and one count of grand larceny from the Polar Bar at the same time and place (A. 1-2). Trial commenced on September 28, 1970.

The issue of Green's juvenile record initially arose during the voir dire examination of prospective jurors when the prosecution moved for a protective order to preclude discussion during jury selection and cross examination of witnesses of the fact that witness Richard Green had been adjudicated to be a delinquent and was under supervision of the juvenile court (A. 5. Green was on probation for the burglary of two cabins (A. 15). Both sides characterized Green's testimony as essential to the State's case (A. 4, 6). Initially the court was favorably disposed toward denying the prosecution's request for a protective order. However, during the overnight recess the judge had a change of heart and granted the motion *in toto.* In ruling the court stated:

THE COURT: I agree, Mr. Wagstaff. I'm doing this for the record. My comments are for the record because I feel since our supreme court has limited me and the statute limits me and I am here to enforce the law, I have to follow it whether I agree with it or not and whether I like it or not and I'm doing so to the best of my ability although I find moments of rebellion within my own soul. Anything further, Mr. Ripley?

MR. RIPLEY: No, Your Honor, but since it is a hairline area and since the slightest injudicious (indiscernible–cough) on cross examination can lead to a situation which will become instantly in violation of the court's order, I hope that all parties are clear. It's my understanding that not only will there be no reference to juvenile trials or adjudication, juvenile record, supervision by parole or police authorities, police contacts or police investigation, because anything that opens up anything in that area, support it, goes directly to the adjudication, which is denied.

THE COURT: I am granting you this protective order accordingly and Mr. Wagstaff I'm certain will follow it.

MR. RIPLEY: I'm sure he will.

THE COURT: I know he disagrees with me and I, as I say, sympathize, as I stated for the record, but I'm sure that Mr. Wagstaff would be very judicious in his cross examination in that area.

MR. RIPLEY: As long as it's clearly understood.

THE COURT: Yes.

MR. RIPLEY: Thank you, Your Honor.

THE COURT: Anything further, Mr. Wagstaff?

MR. WAGSTAFF: No, Your Honor. (A. 21-22)

The cross examination of Richard Green was conducted under the explicit strictures of this protective order. Green's testimony revealed that he was first informed of the finding of the safe by his mother (A. 27). Green testified that earlier in the day he had observed two black males, one of whom was holding something similar to a crowbar, standing by a metallic blue Chevrolet near where the safe was later found (A. 29-31). Green testified that he had been enroute to get some coffee from another house on his father's property at the time and that the two men were still in about the same position when he returned from his errand (A. 31). He then identified Joshaway Davis as one of the men he had seen and spoken with (A. 31-32). Green admitted that he had previously picked Joshaway Davis' photo from a series of pictures (A. 33, 35) and further admitted that the man in the picture he identified did not look exactly like the man he claimed to have seen in Palmer (A. 35).

On cross examination defense counsel asked Green whether or not he was upset when a safe was found on his property; the answer was no. Counsel next asked whether Green initially felt that he might in some way have been a suspect himself; the answer was no. Counsel asked whether or not Green had felt uncomfortable about the situation; the answer was no. Counsel asked whether it occurred to him that the police might think he had something to do with the burglary; he answered that it had crossed his mind. Counsel asked if he had ever been questioned before by law enforcement officers; his answer was no (A. 33-34).

FBI expert Palmer testified that paint chips found in some of the vacuum debris from the rented car were similar to the paint on the safe and "could have originated" from the safe (Tr. 180). He did not know

whether or not different safe manufacturers used the same type of paint or whether the paint actually came from a safe at all (Tr. 181). FBI expert Hughes testified that some of the vacuumed evidence taken showed signs of vermiculite insulation fibers, but he could not testify that they came from the safe in question or even a Mosler safe (Tr. 206). No paint chips or fibers were found on petitioner's boots, coat, trousers or coveralls (Tr. 186, 208) nor on the tire iron (Tr. 256). Investigator Weaver linked the paint chips and vermiculite fibers only with the trunk of the rented vehicle (Tr. 176-80, 201-05, 263-65, and prosecution's summation Tr. 387). The jury returned a verdict of guilty on both counts (A. 3, R. 199-201).[3]

ARGUMENT

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS ABROGATED BY THE TRIAL COURT'S PROTECTIVE ORDER.

A. General History and Supreme Court Decisions

The origins of the right to confrontation are found in the common law. Wigmore writes that the right of confrontation became firmly established in the early 1700s with the final establishment of the hearsay rule:

> It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one:
>
> (1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands con-

[3]The facts of the case are also stated in the Supreme Court of Alaska's opinion (A. 45-47).

frontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

That this is the true and essential significance of confrontation is clear, from the language of counsel and judges from the beginning of the Hearsay rule to the present day:[4] *Wigmore on Evidence*, Volume V, Section 1395, pp. 122-24 (3rd ed).

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[4]1680, L.C.J. Hale, Pleas of the Crown, I, 306 (commenting on St & 6 Edw. VI, c. 12 §12 (1552); "which said accusers (of treason) at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that that they have to say to prove him guilty"): "Yet in case of treason, where two witnesses (i.e. accusers) are required, such an examination (before a justice of peace) is not allowable, for the statute requires that they be produced upon the arraignment in the presence of the prisoner, to the end that he may cross-examine them."

1696, *Fenwick's Trial*, 13 How. St. Tr. 591, 638, 712 (before the House of Commons). Sergt. *Lovel* (for the prosecution): "We have Mr. Goodman's examination under the hand of Mr. Vernon; we pray it may be read." Sir. B. *Shower* (for the accused): "Mr. Speaker, . . . I humbly oppose the reading of this examination, as not agreeable to the rules of practice and evidence, and that which is wholly new. . . . No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination and might have cross-examined him or examined to his credit, if he thought fit. . . . Our law requires persons to appear and give their testimony 'viva voce'; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances which may lay open the falisty of a well-laid scheme, which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read. . . . We oppose it at present for that we were not present

In *Greene v. McElroy*, 360 U.S. 474 (1959), a case in which this Court held that procedural due process' requirement of confrontation applied to the revocation of a private employee's security clearance by the Department of Defense, the even more ancient roots of confrontation were alluded to:

> When Festus more than 2000 years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to

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nor privy nor could have cross-examined him." Sir T. *Powis*, arguing: "How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence; and that is due to every man in justice."

1720, *Duke of Dorset v. Girdler*, Finch's Prec. Ch. 531: "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III, c. XIX: "Under the head of Confrontation may be found whatever advances (scanty indeed they will be seen to be) have been made in Roman procedure towards the introduction of that universal and equal system of interrogation above delineated and proposed,—consequently whatever part has been covered by the Roman law of the ground covered by the operation called Cross-examination in English law. The operation has two professed objects: one is the establishing the identity of the defendant, viz. that the person thus produced to the deponent is the person of whom he has been speaking; the other is that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his disadvantage, to obtain the extraction of such other part (if any) of the facts within the knowledge of the deponent as may operate in his favor. . . . (It is in Continental law) an imperfect modification of cross-examination, . . . a faint shadow of it."

> have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crimes laid against him." Acts 25:16. 360 U.S. 474, 496, N. 25.

Last century, in *Mattox v. United States*, 156 U.S. 237, 242 (1895), this Court spoke directly of the Sixth Amendment guarantee of confrontation:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

In *Salinger v. United States*, 272 U.S. 542, 548 (1926), the Court specifically noted the early common law origin of the right of confrontation:

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions. (citations omitted)

Five years later, in *Alford v. United States*, 282 U.S. 687, 691 (1931), a case involving the propriety of asking a prosecution witness on cross examination where he lived, when the purpose of the inquiry was to bring out

the fact that although not convicted the witness was in the custody of federal authorities thereby indicating a tendency toward bias and prejudice, this Court stated:

> Cross examination of a witness is a matter of right (citation omitted). Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his own reputation for veracity in his own neighborhood (citations omitted); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (citations omitted); and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (citations omitted).

Continuing, the Court held that:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him (citations omitted). 282 U.S. 687, 692.

This Court recognized that the legitimate purpose of the question was not to discredit the witness by showing he was charged with a crime, but to show by the fact of his custody that his testimony was biased because given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States–the proponents of his testimony. The Court found that it was not material why the witness was in custody, holding:

> Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out

> of his detention. The extent of cross examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted (citations omitted). But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. 282 U.S. 687, 693-94.

The developing case law of this Court under the Sixth Amendment firmly establishes the right to cross examine with only Fifth Amendment exceptions. Inherent in this right is necessarily the right to discredit a witness' or accuser's testimony by any appropriate means. The Court has stated that evidence of bias, self interest, motive and apprehension are relevant in cross examination. It was further held in *Alford v. United States*, 282 U.S. 687, *supra*, that the jury must be free to determine what pressures a witness is under simply by his being in government custody. The same rationale should and does apply to juvenile probation.

In *Pointer v. Texas* 380 U.S. 400 (1965) this Court recognized that the Sixth Amendment's guarantee protecting the accused's right to confront witnesses against him was obligatory on the states through the Fourteenth Amendment. It was held at 380 U.S. 405:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right to confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that

> to deprive an accused of the right to cross examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

In an opinion handed down the same day, *Douglas v. Alabama*, 380 U.S. 415 (1965), a co-defendant, Lloyd, had claimed his privilege against self incrimination and had his memory "refreshed" by a confession which implicated petitioner Douglas. Since the confession was not admitted into evidence no cross examination was permitted. This Court, reversing, held:

> Hence effective confrontation of Lloyd was possible only if Lloyd affirmed the statement as his. However, Lloyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Lloyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Lloyd's refusal to answer was procured by the petitioner (citation omitted). 380 U.S. 380, 420.

An analogy can be drawn between prosecution witness Lloyd who claimed his privilege against self incrimination and witness Green who, from petitioner's perspective, received the same benefits through the trial judge's protective order. Either way, effective cross examination was curtailed. See also *Barber v. Page*, 390 U.S. 719 (1968).

In the more recent case of *Smith v. Illinois*, 390 U.S. 129 (1968), this Court found that the sustaining by the trial court of the prosecution's objection to questions on cross examination as to the witness' correct name and place of living, apparently on the basis that he somehow might be endangered thereby, was violative of the Sixth Amendment right to confrontation. In so doing the Court revitalized *Alford v. United States*, 282 U.S. 687, *supra*,

citing it extensively and indicating that any considerations concerning the non-constitutional protection of an accusatory witness must necessarily yield to the confrontation rights of the Sixth Amendment. So, too, in the case of a juvenile witness–any statutory right protecting his juvenile court records must necessarily give way to the Sixth Amendment confrontation rights of the accused. See *Chambers v. Mississippi*, ___ U.S. ___, 12 CrL 3150 (1973) rejecting the "voucher" rule.[5]

The Rules of Evidence for United States Courts and Magistrates, ordered adopted by this Court on November 20, 1972, 12 CrL 3011, recognize petitioner's position for federal courts inasmuch as Rule 609(d) permits the admissibility of a juvenile adjudication of a witness other than the accused if it would be admissible against an adult to affect credibility and the trial judge is satisfied that its admission is necessary for a fair trial.

B. The Trial Court's Ruling Violated the Sixth Amendment

The Alaska Supreme Court found the series of questions initially propounded to Richard Green on cross examination adequate for confrontation purposes (A. 59-60). These few questions, answered in a negative and self serving manner, cannot be a constitutionally adequate substitute for permitting the jury to hear and consider those relevant facts pertaining to Green's circumstances

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[5] "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional rights of confrontation and helps assure the 'accuracy of the truth determining process' . . . its denial or significant diminuation calls into question the ultimate 'integrity of the fact finding process' and requires that the competing interest be closely examined." ___ U.S. ___, 12 CrL 3153.

which reflect upon his credibility. In this context it should be recalled that the protective order which precluded any effective relevant cross examination was granted during the voir dire examination; witness Green therefore knew of its existence before he testified. When Green testified that he had never been questioned by police officers before, he could only have done so secure in the knowledge that he could not be impeached on this particular issue. Witness Green knew he could answer any questions of this nature in a self-serving manner, unfettered by any possibility of specific impeachment or demonstration of bias, self interest, motive or apprehension. The jury was never permitted to assess for itself the pressures Green necessarily would have felt before identifying someone else out of a group of photographs—which identification was, by his own testimony, less than positive.

The circumstances of station house interrogations have been recognized by this Court to be inherently coercive. *Miranda v. Arizona*, 384 U.S. 436 (1966). To this basic reality were added a small room, the presence of four police officers, a seat between two detectives and the packaging of pistols. Under the trial court's protective order the jury was encouraged to believe that witness Green was only performing a civic duty with his identification. The jury was not allowed to determine the effect that the above circumstances would have on a juvenile on probation for burglary who had a stolen safe discovered on his property. After the cursory photographic show up Green was frozen to an identication of Joshaway Davis and was not about to change his mind. As was noted in *United States v. Wade*, 388 U.S. 218, 229 (1967):

> Moreover, it is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may be (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial.

Furthermore, counsel was precluded by the court's order from asking Investigators Weaver and Gray what pressures they put on Green when they interrogated him—specifically with respect to the fact that Green was on probation for burglary. Investigator Gray testified he at no time suspected Green himself was involved in the burglary (Tr. 136-39). Counsel should have been permitted to ask Gray whether this absence of suspicion was consistent with his knowledge of Green's burglary record and the fact the safe was discovered on Green's property.

The trial court issued its protective order pursuant to Alaska Rule of Juvenile Procedure 23 and Alaska Statute 47.10.080, cited above. The Alaska Supreme Court in Section 4 of its Opinion (A. 59-60) discusses the general issue raised herein. Although the majority opinion adverted to a conflict between the statutory interest in protecting the anonymity of a juvenile transgressor and the constitutional interest of affording the defendant an adequate opportunity to confront adverse witnesses, the court found that counsel for the defendant was able to adequately question witness Green concerning the possibility of bias or motive. The court found that the indirect references to the juvenile witness' apprehension or possibilities of bias or motive were sufficient for adequate cross examination albeit these assurances were conceded to be self serving. Petitioner urges upon this court Justice (now Chief Justice) Rabinowitz's dissenting opinion to this issue, set forth on pages 63 through 65 of the

Appendix. Justice Rabinowitz found the trial court's protective order erroneous in curtailing cross examination of the crucial juvenile witness. He specifically found that this error was not harmless under *Chapman v. California*, 386 U.S. 18 (1967), and recognized that the purpose of bringing out the juvenile record was to show the witness' bias as well as his motive in giving testimony for the prosecution. Quoting from his dissent:

> In the case at bar, the majority believes that Davis' constitutional right of confrontation was satisfied because his counsel "alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension". In my view, this falls far short of the confrontation right guaranteed Davis. Vague speculations concerning ulterior motives and the possibility that the juvenile witness' identification of Davis arose from apprehension are hardly adequate substitutes for bringing home to the jury the fact that the juvenile witness was on probation for burglary at the time he testified. The right of confrontation required that Davis be permitted to show that the witness was on probation for burglary and also encompassed the right to inquire into the circumstances of the witness' relations with the police.
>
> I find the majority's reliance upon Rule 23, Alaska Rules of Children's Procedure, inappropriate here. The accused's fundamental right to confront adverse witnesses against him outweighs any interest in protecting a juvenile witness from disclosure of his prior adjudication of delinquency and from disclosure of the disposition order.

The juvenile rules and statutes in question were not enacted to abrogate the rights of the accused; their

purpose is only to create anonymity of records. The only protection a witness is entitled to when he testifies against another in a criminal case is that found within the Fifth Amendment. His records as a juvenile are admissible to attack general credibility and the circumstances thereof to show any bias, self interest, motive or apprehension within his testimony. The mere fact of a juvenile record would give rise in and of itself to argument that the witness' testimony was affected by his desire to better his own position in the eyes of the government who has called him forth to testify. The true purpose of the rule would be frustrated and perverted if a juvenile record were not available to be shown to the jury when the juvenile is testifying against the accused in a criminal prosecution, particularly when the record and circumstances surrounding it would show a tendency toward bias, self interest, motive or apprehension. Wigmore notes this distinction:

> A judgment, finding or proceeding of delinquency in a juvenile court is by modern statutes forbidden to be used "against the child" in any other court. It would be a blunder of policy to construe these statutes forbidding the use of such proceedings to affect the credibility of the juvenile when appearing as a witness in another court. A typical delinquent is a girl of corrupted environment of nymphomaniac tendency; such a girl is often the cause of injustice to an innocent man by making false charges of rape or indecent liberties and the revelations in the juvenile court may be the best or even the only means of exposing the testimonial untrustworthiness of the witness. Neither the policy nor the wording of the statute (liberally construed) should forbid such use. *Wigmore on Evidence*, Volume 3a, §980(7), page 834 (revised edition 1970).

The only real interest of the juvenile is to prevent public disclosure of his record with possible attendant societal sanctions. This interest can be protected in appropriate cases by the expedient of excluding the public from the courtroom during the critical portion of the examination as is generally the case with juvenile proceedings.

C. Lower Court Decisions

Several state and federal courts have ruled either near or directly on this issue. *Brown v. United States*, 338 F.2d 543 (D.D.C.A. 1964), is a typical case in example. The opinion written by Circuit Judge Warren E. Burger held that it was error for a prosecutor, on cross examination of a juvenile companion of the defendant's whose testimony exculpated defendant, to bring out that the juvenile companion had been committed to The National Training School. The court held that the juvenile record was inadmissible for impeachment as commitment to The National Training School was not the equivalent of a criminal conviction under any theory. Under District of Columbia Code of Evidence only a criminal conviction was admissible for impeachment. This case is distinguishable on two grounds: Initially, as the witness in question was a defense witness the right of confrontation under the Sixth Amendment was not involved; and secondly, in the case at bar the admission of the juvenile record was not sought solely for purposes of general impeachment by a criminal conviction but was offered for the additional purpose of showing the apprehension, motive, self interest and bias of the

witness. Other cases apparently against petitioner's position are similarly distinguishable.[6]

[6]The following cases are representative.

State v. Tolias, 326 S.W.2d 329, 333 (Mo. 1959), was a murder case in which the defendant claimed the trial court erred in not permitting him to show that a state's witness had been convicted in a juvenile proceeding of stealing "in matters growing out of this case" and at the time of trial was confined in a juvenile institution. Defendant contended that these matters went to the interest and credibility of the witness. The Missouri Supreme Court held that the disposition of a case in juvenile court is not deemed a conviction and is not admissible "for any purpose whatsoever". The court held there was no error but did not discuss any matters of self interest, bias, motive or apprehension of the witness nor was the Sixth Amendment mentioned.

In *State v. Laws*, 50 N.J. 159, 233 A.2d 633 (1967), the prosecution brought out that one of its witnesses had been committed for certain juvenile offenses; the New Jersey Supreme Court found the clear legislative policy in New Jersey was that any adjudication of juvenile offenses should not be viewed as criminal convictions and were not admissible as evidence against a juvenile in any other court proceedings. The court accordingly held that the state might well have withheld its evidence with respect to the witness' juvenile adjudications (it was one of defendant's specifications of error) and that its mention was helpful to defendants.

In *Noel v. State*, 215 N.E.2d 539, 541 (Indiana 1966), a prosecution for prostitution, the defense attempted to bring out the juvenile record of the chief prosecuting witness who was on parole from the "Girls School". The trial court found it inadmissible, and the Indiana Supreme Court affirmed stating that the Indiana statute relating to the secrecy of juvenile records mandated that a juvenile record not be used for purposes of impeachment. The court did not mention bias, self interest, motive, apprehension or the Sixth Amendment right of confrontation.

Another example of this genre of cases is *Witt v. State*, 244 N.W. 395 (Neb. 1932), a rape case in which the defendant attempted to show that two of the state witnesses had been

The historically leading case which favors petitioner's position is *People v. Smallwood*, 306 Mich. 49, 10

committed to a state girls' training school. The Nebraska Supreme Court, without mentioning confrontation or bias, held that the proffered evidence was not relevant to any issue in the case and was therefore properly excluded.

In *Larkin v. United States*, 144 A.2d 100 (M.C.A.D.C. 1958), the court held, without discussion, that in a prosecution for indecent assault on a 14-year-old boy the juvenile court records of the alleged victim were inadmissible. The court did indicate that if the records showed similar accusations in the past the records would have relevance, but as this was not raised at trial it could not be raised now.

In a case which skirts the basic issues, *United States v. Fay*, 240 F. Supp. 848 (S.D.N.Y. 1965), a federal habeas corpus proceeding in which Fay complained that he was not permitted to bring out the juvenile record of an alleged accomplice of his who plead guilty and testified for the state, the court held it was harmless error because his criminal proclivities were demonstrated adequately by his adult record. The court found that the jury was well aware of the witness' criminal activities and that his own interest might well have motivated him to give false or fabricated testimony against the petitioner. The court held, in light of the state's policy of "obliterating the transgressions which give rise" to a youthful offender adjudication, the fact the jury was not specifically apprised of the witness' youthful derelictions did not deprive petitioner of fair trial. The district court gave strong indication in its opinion that under some circumstances confrontation requires exposure of juvenile records, although the Sixth Amendment was not mentioned directly in the opinion.

In *Martinez v. Avila*, 76 N.M. 372, 415 P.2d 59, 61 (1966), a civil case involving an accidental shooting in which the juvenile records showing involvement of the plaintiff and his witness in a prior accidental shooting were held properly inadmissible for impeachment, the New Mexico Supreme Court stated:

> As a matter of fact the almost unanimous rule in all types of proceedings is to refuse to allow a cross examiner to delve into the juvenile hearing in any manner, subject only to the possible exception of criminal cases in which the question of chastity is made an issue.

N.W.2d 303 (1943), which is also the subject of an annotation appearing at 147 ALR 443. The case involved

The disallowance of the admission of records under the facts of *Martinez* would probably displease Professor Wigmore and raise due process questions, discussed *infra*.

Predictably, courts have generally held that juvenile records are not admissible in civil actions. For example, in *Smith v. Rural Mutual Insurance Company*, 20 Wis. 2d 592, 123 N.W.2d 496 (1963), the Wisconsin Supreme Court held in an automobile negligence case that the fact that a driver's license was suspended could not be admitted against the defendant on cross examination under state law which precluded the adjudication of any juvenile court from being admitted for impeachment.

In the subsequent case of *Banas v. State*, 34 Wis. 2d 468, 149 N.W.2d 571 (1967), the Wisconsin Supreme Court held that, while a conviction may affect the credibility of a witness who has been convicted of a criminal offense, juvenile offenses are inadmissible. Citing *Smith v. Rural Mutual Insurance Company*, 123 N.W.2d 496, *supra*, the court, in an auto theft case, held that the primary witness for the prosecution, who was a 16-year-old parking lot attendant and witnessed the automobile in question being stolen, could not be cross examined concerning his juvenile court record of auto theft. The court stated:

> Counsel for Banas was prevented from examining the juvenile witness concerning his alleged juvenile court record. It is argued this record would show the witness had been found delinquent by the Waukesha County Juvenile Court and other matters including his apprehension and interrogation concerning an auto theft, all of which would go to his credibility. The trial court ruled the juvenile court records were confidential and could be released only by the juvenile court judge and the finding of the juvenile court that the witness stole an automobile was not a conviction in a criminal sense and could not be used for impeachment purposes.
>
> Banas now claims his constitutional rights were violated by this refusal to permit him to impeach the record. We think not. 149 N.W.2d 571, 573.

The record was held inadmissible for impeachment purposes simply because it could not be "deemed a conviction". The court either did not consider or simply ignored any Sixth Amendment

a rape prosecution based solely on the testimony of a 15-year-old prosecutrix who was the defendant's own daughter. The Supreme Court of Michigan found it was error not to permit cross examination to show the witness had been in difficulty with juvenile authorities. The court recognized that juvenile records are generally inadmissible for impeachment but then stated:

> However, in the present case, there was no effort to impeach the child's character but rather to ascertain her credibility. The question of how far the statute should reach is not new.

The court then cites Wigmore, *supra,* for authority. The court stated that juvenile records per se are not admissible but that a question showing trouble with juvenile authorities is. Citing an earlier case, *People v.*

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problems. The facts in this case are remarkably similar in character to the case at bar. The court in *Banas* also cited another earlier decision of its own–*Sprague v. State*, 243 Wis. 456, 10 N.W.2d 109 (1943)–in which it held that a defendant who was charged with statutory rape could not require the introduction of a juvenile record of a complaining witness. This earlier decision definitely conflicts with Professor Wigmore's reasoning and those courts who have recognized these circumstances as a bona fide exception, *infra.* In *Banas* the court was only concerned with the protection of the juvenile's statutory rights per his chances for rehabilitation versus probative value for impeachment. The court was silent on confrontation. 149 N.W.2d 571, 575. Petitioner here at bar argues that juvenile records should be available for impeachment and, as in his case, the argument becomes stronger when the record and attendant circumstances are sought to be used for a direct demonstration of bias, motive, self interest and apprehension. The court in *Banas* even conceded that if the juvenile witness were disbelieved it was quite probable that no jury would or should be convinced beyond a reasonable doubt of defendant's guilt. Petitioner is directly at odds with this holding.

Cowles, 246 Mich. 429, 224 N.W. 387, 388 (1929), the court stated:

> We think the testimony should have been received, not in extenuation of rape, but for its bearing upon the question of the weight to be accorded the testimony of the girl and the question of whether the mind of the girl was so warped by sexual contemplation and desire as to lead her to accept the imagined as real or to fabricate and claim sexual experience. 10 N.W.2d, 303, 305.

The court was apparently impressed with the manifest injustice of the proceedings and desired to rectify them. The Sixth Amendment right to confrontation was not discussed and only impliedly referred to. The attempt to distinguish "impeachment" from "ascertain credibility" is probably a manifestation of a due process theory, *infra*. The same argument can properly be made in the case at bar.

The historically recognized exception to the rule of per se exclusion of juvenile records, when recognized at all, occurs in rape cases. Additional authorities demonstrating the injustice often inherent in the rigid application of the traditional rule of excluding juvenile records are cited in the annotation following 147 ALR 443.

In *State v. Searle*, 239 P.2d 995 (Montana 1952), a sodomy prosecution, the defendant contended on appeal he was unduly restricted on cross examination of a prosecution witness by not being permitted to show that the witness had made prior inconsistent statements before a juvenile tribunal. The court noted that the relevant statute prohibited a record from being used against a child but that a witness is not party to the proceeding and that the purpose of the statute is therefore not defeated by allowing inconsistent statements made by him in juvenile proceedings to be used for

impeachment. The court ruled primarily on statutory interpretation distinguishing *Malone v. State*, 130 Ohio St. 443, 200 N.E. 473 (1936); *State v. Kelly*, 164 La. 753, 126 So. 49 (1930); and *State v. Cox*, 263 S.W. 215 (Mo. 1924), which are cited within the 147 ALR 443 annotation, *supra*.

The cases directly in point follow. The Court is urged to accept their reasoning. These authorities, all quite recent, flow in part from the emerging realization of the basic criminal nature of juvenile delinquency proceedings as represented by *Re Gault*, 387 U.S. 527 (1967) and *Re Winship*, 397 U.S. 358 (1970), requiring proof beyond a reasonable doubt in delinquency proceedings, and reflect the impact of *Pointer v. Texas*, 380 U.S. 400, *supra*, in which the Sixth Amendment confrontation clause was made applicable to the states.

In *People v. Yacks*, 38 Mich. App. 437, 196 N.W.2d 827 (1972), the most recent case, the Michigan court held that if a key prosecution witness had a juvenile record then the defendant, who was denied the opportunity on cross examination to impeach this witness with a prior juvenile record and complained of a Sixth Amendment violation, was entitled to a new trial. The court cited its earlier case of *People v. Davies*, 34 Mich. App. 19, 26, 190 N.W.2d 694 (1971), which stated:

> There is no sound reason for excluding the history of juvenile offenses in a case not "against" the juvenile offender but against someone else whose liberty is at stake. If, as is the law, the jurors are entitled to know "what manner of person the defendant is" if he takes the stand, surely they are also entitled to know what manner of person the people's chief witness is. In this connection it is relevant that our court has held that a judge may consider a defendant's juvenile record when impos-

> ing sentence. Clearly if the policy of a statute does not protect the juvenile against use of his juvenile record against him when he is sentenced for another crime, it is not so pervasive that it protects him against disclosure of his record when he is a witness–here the chief, perhaps indispensible, witness–against someone else.[7]

In *Davies* the court refused to restrict the "Smallwood exception" of the earlier Michigan decision of that name to rape cases (*People v. Smallwood*, 306 Mich. 49, *supra*).

The same court, in *People v. Basemore*, 36 Mich. App. 256, 193 N.W.2d 335 (1971), found reversible the trial court's refusal to allow defense counsel to place before the jury the record of two juvenile identification witnesses, one of whom identified defendant both at the line up and at trial, the other of whom was unable to identify him at line up but did identify him at trial. Again citing *People v. Davies*, 34 Mich. App. 19, *supra*, the court held it was simply per se reversible error to prevent use of a juvenile witness' general juvenile record to impeach his credibility when he testified against someone else. In this case, as in *Davies*, it was not necessary even to show that the nature or circumstances of the juvenile record would have been an independent basis for an attack on credibility, the fact of record alone was sufficient.

In direct point also is *Hamburg v. State*, 248 So.2d 430 (Miss. 1971), in which the Mississippi Supreme Court found error in a case in which the accused was charged with the possession of LSD and was not permitted to cross examine a juvenile whose testimony implicated him

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[7]See Alaska Juvenile Rule 23, *supra*, and *Commonwealth v. Moyer*, 343 Pa. 224; 144 A.2d 367 (1958).

to show the witness was a juvenile delinquent, was afraid of being returned to training school and had committed various specific acts of delinquency, stating:

> The fundamental right to be confronted by witnesses against an accused guaranteed by Article 3, Section 26 of the Mississippi Constitution (1890) and the Sixth Amendment to the Constitution of the United States would be an empty right if the accused were not permitted to cross examine the witnesses as to the reliability of their testimony. It is conceivable that a juvenile could be held to be delinquent because of the illegal handling of narcotics. In that case it would violate every sense of justice if one were accused by such a delinquent but was unable to show that such juvenile was in a place equally accessible to the contraband, and he had previously been declared a delinquent by reason of his connection with illegally handling dangerous drugs.
>
> We are of the opinion that the broad fundamental right of the accused to cross examine his accuser transcends the right a juvenile has to keep secret his former delinquent activity. This is particularly true under the wording of our statute which only prevents the use of a juvenile delinquent's record in proceedings concerning him. 248 So.2d 430, 434.

The court so held even though the trial court had permitted defendant to establish that the witness was on probation as a juvenile.

The *Hamburg* case and the Michigan trilogy of *Davies, Basemore* and *Yacks, supra,* are irreconcilably in conflict with the blanket prohibition cases cited above[8] which fact underlines the need for this Court's action on the issue.

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[8] See *Banas v. State*, 34 Wis. 2d 468, *supra*.

II.

IN ADDITION TO DENIAL OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION, THE TRIAL COURT'S RULING DENIED PETITIONER THE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

It is also urged upon the Court that the denial of the right to cross examine witness Green as to his juvenile record and fact of probation was a denial of the due process of law. Due process of law is not precisely definable or reducible to a mathematical formula. *Gibbs v. Burke*, 337 U.S. 773, 781 (1949). It has evolved to come to express our basic concept of justice under law, "our traditional conception of fair play and substantial justice", *Galvan v. Press*, 347 U.S. 522, 530 (1954); the "protection of the individual from arbitrary action", *Slochower v. Board of Higher Education of New York City*, 350 U.S. 551, 559 (1956); "fundamental principles of liberty and justice", *In Re Groban*, 352 U.S. 330, 334 (1957); whether there has been a "[denial of] fundamental fairness, shocking to the universal sense of justice", *Kinsella v. United States*, 361 U.S. 234, 246 (1960); "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct", *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957); and a "respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', * * * or are 'implicit in the concept of ordered liberty.' ", *Rochin v. California*, 342 U.S. 165, 169 (1952).[9]

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[9] Adapted from *Green v. State*, 462 P.2d 994 (Alaska 1969).

Under these terms and definitions, the denial of the right to cross examine witness Green as to his juvenile record and fact of probation so as to generally attack his credibility and demonstrate bias, motive, self interest and apprehension offends our traditional concepts of fair play and substantial justice.[10]

III.

THE ERROR WAS NOT HARMLESS

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that before constitutional error can be said to be harmless it must be shown beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The Court recognized harmless error as a very narrow doctrine:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. 386 U.S. 18, 22.

Petitioner Davis contends that under the facts of this case the error in the denial of confrontation cannot be said to be harmless. Witness Green's testimony was critical, as admitted by the prosecution (A. 4). Without Green's identification the only evidence against Davis of an incriminating nature were insulation fibers and paint chips that were found in the back of his rented car which only "could have originated" from the safe in question (Tr. 180, 206). No such fibers or paint chips were found on any of the clothing belonging to Davis (Tr. 186,

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[10] See *Pointer v. Texas*, 380 U.S. 400, *supra*.

207-08) and none of the contents of the safe were ever found (Tr. 282).

In the subsequent case of *Harrington v. California*, 395 U.S. 250 (1969), this Court again discussed harmless error and held the lack of opportunity to cross examine co-defendants after their confessions were admitted constituted harmless error because the other evidence was overwhelming and was not circumstantial. *Chapman* was a circumstantial evidence case. The case at bar, even with Green's identification, is totally circumstantial. The test is this Court's judgment, based on a reading of the record, of what the probable impact on the jury would have been if it had known the facts and circumstances of Green's record and probation. A juvenile burglar, on probation for that offense, upon whose property was found a burglarized safe, accuses someone else of being the burglar. This is a vastly different picture from that painted by the prosecution of a public spirited youth who was just trying to help the police.

Green stated that when he initially identified the picture of Davis after a cursory scanning the picture was only "similar" (A. 35). The station house pressures on Green have been described under the first heading herein. At the subsequent lineup where the person portrayed in the picture was present, Green became more locked into the identification and, as noted above, was extremely apt to stick to it. Additionally, Investigator Weaver testified that as he was bringing Green to Anchorage for the photograph show up Green described the shorter of the two blacks he saw as having a mustache (Tr. 231). Green identified petitioner Davis as being the shorter (Tr. 311) but then said the man he saw didn't have a mustache (Tr. 317). The defense in the case as outlined in defense counsel's opening statement (A. 23-25) and closing

argument (Tr. 390-417) was that the identification by Green was not reliable and credible. The defense called no witnesses (Tr. 365). The jury was out from 4:16 P.M. to 11:35 P.M. (Tr. 427) indicating that even with what little they knew about Green, his testimony was not very convincing.

As Justice Rabinowitz stated in his dissent:

> Given Davis' constitutional rights, under both the Alaska and Federal Constitutions, to confront adverse witnesses against him and the quality of the prosecution's totally circumstantial case against Davis, the trial court's erroneous curtailment of cross examination of this crucial juvenile witness cannot be characterized as harmless error under either the *Love v. State*, 457 P.2d 622 (Alaska 1969), or *Chapman v. California*, 386 U.S. 18 (1967), differing standards for determination of harmless error. (A. 63)

CONCLUSION

For the foregoing reasons petitioner Joshaway Davis prays this Court to find the trial court's protective order to be prejudicial constitutional error, reverse, and remand for a new trial.

Respectfully submitted,

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